The Kornitzer Edition

שו"ת
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כרך ג

תשובות צט–קכו

Volume 3 — Teshuvos 99–126

Phrase-by-Phrase English Translation
Explanations and Summaries
Indexes of Sources & Subjects

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Dedication

This volume is dedicated to the enduring legacy of Rabbi Akiva Eiger (1761–1837), one of the foremost *gedolei ha'acharonim*, whose penetrating brilliance in Torah was matched by extraordinary humility, purity of character, and unwavering devotion to *Klal Yisrael*.



Born into a distinguished family of Torah and shaped in the great centers of learning of his time, Rabbi Akiva Eiger rose to become a preeminent authority in *halachah*, serving as *Rav* and *Rosh Yeshivah* in the illustrious community of Posen. His *Teshuvos* and *Chiddushim*, marked by precision, depth, and clarity, remain foundational to the study of Gemara and *psak*, guiding generations of *talmidei chachamim*.



Yet alongside his unparalleled greatness stood profound modesty and simplicity. As recorded by the Mitteler Rebbe, who met him in Posen, he was "a genuine person… humble and unpretentious with all people," embodying a life of complete dedication to Torah and to the needs of his community.



This Kornitzer Edition of *Shailos u'Teshuvos Rabbi Akiva Eiger*, presenting the original Hebrew text with faithful elucidation, is dedicated by the Kornitzer family, descendants of Rabbi Akiva Eiger, as an expression of gratitude to Hashem for the privilege of transmitting his Torah and ensuring that his voice continues to illuminate future generations.



May the merit of learning this *sefer* bring blessing to all who engage with it, and may we soon merit, with the coming of *Moshiach*, to hear new *chiddushim* in Torah from Rabbi Akiva Eiger himself. And may this effort serve toward fulfilling the longing so often expressed by the Lubavitcher Rebbe—that through the dissemination of Torah, illuminated for our generation, we hasten the true and complete *Geulah*. May *Moshiach* come speedily in our days, ממש.



תשובה צט

Infidelity, Ki'ur, and Mamzeirus in Extended Absence

Family Law > Permission for a Woman to Remarry After Refusal, Divorce, or Death of the Husband • *Family Law > Laws of Forbidden Unions* • *Family Law > Laws of Niddah Impurity and Its Prohibition*

Summary

Correspondent and Context: Rabbi Akiva Eiger writes to Rabbi Chaim of Zlatova about a married woman suspected of adultery. Rabbi Chaim sent the detailed case from his local *beis din* for review.
The Question (Sha'ila): The woman's husband came home on Friday, Erev Pesach, and they were intimate. He left on the Wednesday after Pesach. Eight days later she menstruated, a few days before her expected *veses*. She menstruated again before Shavuos. She then stopped menstruating and showed signs of pregnancy. On the first day of Purim, she gave birth to a son, ten months and three weeks after her husband left. Two valid witnesses described suspicious conduct. One saw her leave her house at midnight with the suspected young man. The other heard people in her kitchen and found her holding the door shut. Women, a non-Jewish woman, and the suspected man's brother gave further evidence of an illicit relationship. The suspected man admitted that she propositioned him, but said he refused. He claimed that a non-Jew had fathered the child and that the child was a *mamzer*. The questions are whether she is forbidden to her husband and whether the child is a *mamzer*.
The Ruling (Teshuvah): Rabbi Akiva Eiger does not give a final ruling. He analyzes the issues and leans toward leniency on several grounds. He says he will not rely on his view alone. He seeks agreement from leading *gedolei hador*, including Rabbi Meir Posner of Schotland and Rabbi Hirsch of Glogau.
Shulchan Aruch Background: The teshuvah discusses several parts of the Shulchan Aruch. Even HaEzer 11 defines *ki'ur* and its effects. The Rema on Even HaEzer 4 and 7 discusses whether *ashtahuyei ishtahi*—a delayed birth—can establish a child's legitimacy after the husband has been absent. Choshen Mishpat 28 addresses testimony accepted without a litigant present. Even HaEzer 115–116 discusses a wife's conduct, loss of her *kesubah*, and a single witness whom the husband believes like two witnesses (*ne'emanus k'bei trei*).
Key Disputes (Machlokes): The teshuvah discusses five disputes. (1) The Rosh limits *hefker beis din hefker* to monetary cases. The Rashba says presence is required by Torah law only in capital cases and by rabbinic law in monetary cases. (2) The Rema and Maharshal dispute whether standing with a suspected man on a public street at night is *ki'ur*, or whether true seclusion is required. (3) Maharam and the Rosh dispute whether *ki'ur* alone forbids a woman, or whether there must also be a persistent rumor (*kol d'lo posik*). (4) The Rashba and Maharik dispute the force of a contradicted single witness when the husband believes him. (5) The teshuvah asks whether simple *yichud* is *ki'ur*, or whether there must be circumstances like entering together and closing the doors.

לִידִידִי הָרַב רַבִּי חַיִּים נֵרוֹ יָאִיר
בְּקְהִלָּה קְדוֹשָׁה זְלָאטְוָוע

To my dear friend, the Rav, Rabbi Chaim, may his light shine, in the holy community of Zlatova.

Regarding his question, and this is its wording. A woman whose

husband came home on Friday, Erev Pesach, and she immersed and they were intimate. And on Wednesday after Pesach he departed to distant places, and has still not returned home. Eight days after his departure from her, she menstruated, which was then a few days before her expected veses, and she menstruated again at the time of her veses before the festival of Shavuos, with a heavy flow, and from then on she ceased seeing even a drop of blood the size of a mustard seed, and she was then disgusted for some weeks somewhat by food, in the manner of pregnant women. On the first day of Purim she gave birth to a male child. And more than that, she deviated from the way of most women and gave birth after ten months and three weeks from the day her husband departed from her. The birth occurred significantly later than the standard nine months, raising the question of legitimacy. **And there are two valid witnesses who testified before the beis din with examination and interrogation and under the formula of "if he does not testify, he shall bear his sin."** The verse states a witness's duty to testify. **The first one testified in the following words: "Before the festival of Shavuos, in the middle of the night, I was sitting before the entrance of my house opposite the house in which the woman resides. I saw that the door of her house was open. I thought to see what this was, that the door was open in the middle of the night. I saw the woman exit the entrance of the house with a certain young man with whom she was already suspected. When she saw me, she fled to a small room called a Stuben Kammer."** This is the Yiddish/German term for a small sitting room or antechamber. **"And the young man walked slowly. When I came close to him, he began to run very fast to behind one of the houses." The second witness testified, and this is his wording: "On the last Yom Tov, I was at the beginning of the night in my house. I heard that people were sleeping in the kitchen called Küche." "I thought perhaps there were thieves there, and I hurried to go and see. When I came to the door, the woman held the door and did not allow the door to be opened. And I could not see her from the candle in my room. When I wanted to open the door by force and rouse people to come see what these actions were, my brother did not allow me to open the door and said to me: 'What business do you have with this? They will not believe you anyway.' Today I heard an announcement in the synagogue that whoever knows of any impropriety regarding the aforementioned woman should come and inform. Therefore I have come before the beis din to testify, etc." Although the household members of the brother of**

עַל דְּבַר שְׁאֵלָתוֹ וְזֶה לְשׁוֹנוֹ, אִשָּׁה שֶׁבָּא בַּעְלָהּ לְבֵיתוֹ יוֹם ו׳ עֶרֶב פֶּסַח וְטָבְלָה וְשָׁמְשָׁה, וּבְיוֹם ד׳ אַחַר הַפֶּסַח הָלַךְ לְמֶרְחַקִּים וְעוֹד לֹא בָא לְבֵיתוֹ, שְׁמֹנָה יָמִים אַחַר הֲלִיכָתוֹ מִמֶּנָּה פָּרְסָה נִדָּה שֶׁהָיָה אָז אֵיזֶה יָמִים קֹדֶם וֶוסְתָּהּ, וְכֵן פָּרְסָה עוֹד פַּעַם בְּשָׁעַת וֶוסְתָּהּ קֹדֶם חַג שָׁבוּעוֹת בְּשֶׁפַע רַב, וּמֵאָז פָּסְקָה לִרְאוֹת אֲפִלּוּ טִפַּת דָּם כְּחַרְדָּל, וְהָיְתָה אָז מְמָאֶסֶת אֵיזֶה שָׁבוּעוֹת קְצָת בָּאוֹכְלִין כְּדֶרֶךְ נָשִׁים מְעוּבָּרוֹת, בְּיוֹם א׳ דְּפוּרִים יָלְדָה בֵּן זָכָר, וְיוֹתֵר מִזֶּה דְּשִׁינְתָה מִדֶּרֶךְ רֹב נָשִׁים וְיָלְדָה לַעֲשָׂרָה חֳדָשִׁים וּשְׁלוֹשָׁה שָׁבוּעוֹת מִיּוֹם הִלּוּךְ בַּעְלָהּ מִמֶּנָּה וְיֵשׁ שְׁנַיִם עֵדִים כְּשֵׁרִים שֶׁהֵעִידוּ בְּפָנֵי בֵּית דִּין בִּדְרִישָׁה וַחֲקִירָה וּבְתוֹרַת אִם לֹא יַגִּיד וְנָשָׂא עֲוֹנוֹ הָאֶחָד הֵעִיד בָּזֶה הַלָּשׁוֹן, קֹדֶם חַג הַשָּׁבוּעוֹת בַּחֲצִי הַלַּיְלָה יָשַׁבְתִּי לִפְנֵי פֶּתַח בֵּיתִי נֶגֶד הַבַּיִת שֶׁהָאִשָּׁה דָּרָה בּוֹ רָאִיתִי הַדֶּלֶת בְּבֵיתָהּ פְּתוּחַ, חָשַׁבְתִּי לִרְאוֹת מַה זֶּה שֶׁהַדֶּלֶת פְּתוּחָה בַּחֲצִי הַלַּיְלָה, רָאִיתִי הָאִשָּׁה יָצְאָה מִפֶּתַח הַבַּיִת עִם נַעַר אֶחָד שֶׁכְּבָר נֶחְשְׁדָה עִם הַנַּעַר הַהוּא, כִּרְאוֹתָהּ אוֹתִי בָּרְחָה אֶל חֶדֶר קָטָן הַנִּקְרָא (שטובען קאמער) וְהַנַּעַר הָלַךְ לְאַט לְאַט, כְּבוֹאִי קָרוֹב אֵצְלוֹ, הֵחֵל לָרוּץ מְאֹד לְאֶחָד מֵאֲחוֹרֵי הַבָּתִּים הָעֵד הַשֵּׁנִי הֵעִיד וְזֶה לְשׁוֹנוֹ בְּיוֹם טוֹב הָעָבַר הָיִיתִי תְּחִלַּת הַלַּיְלָה בְּבֵיתִי שָׁמַעְתִּי שְׁיֵשְׁנִים אֲנָשִׁים בַּחֲדַר הַמְבַשְּׁלוֹת הַנִּקְרָא (קיכע) חָשַׁבְתִּי אוּלַי שָׁם גַּנָּבִים, וּמִהַרְתִּי לֵילֵךְ לִרְאוֹת, כְּבוֹאִי לְהַדֶּלֶת, הֶחֱזִיקָה הָאִשָּׁה הַדֶּלֶת וְלֹא נָתְנָה לִפְתֹּחַ הַדֶּלֶת, וְאָנֹכִי לֹא יָכֹלְתִּי לִרְאוֹתָהּ מֵהַנֵּר שֶׁבַּחֲדָרִי, כַּאֲשֶׁר רָצִיתִי לִפְתֹּחַ הַדֶּלֶת בְּחָזְקָה וּלְהַרְעִישׁ אֲנָשִׁים שֶׁיָּבֹאוּ לִרְאוֹת מָה הַמַּעֲשִׂים הָאֵלּוּ, לֹא הִנִּיחַ אָחִי לִפְתֹּחַ הַדֶּלֶת, וְאָמַר אֵלַי מַה

לְךָ בָּזֶה הֲלֹא לֹא יַאֲמִינוּ לְךָ, כְּהַיּוֹם הַזֶּה שָׁמַעְתִּי כְּרוֹז בְּבֵית הַכְּנֶסֶת שֶׁמִּי שֶׁיּוֹדֵעַ שׁוּם פְּרִיצוּת מֵהָאִשָּׁה הַנִּזְכָּר לְעֵיל יָבֹא וְיוֹדִיעַ, לָכֵן בָּאתִי אֵצֶל הַבַּיִת דִּין וּלְהַגִּיד וכו' הֲגַם שֶׁבְּנֵי בֵּית אָחִיו מֵהָעֵד הַשֵּׁנִי סָנֵי שׁוֹמְעָנֵיהּ מִכָּל מָקוֹם אֵין הָעֵד הַזֶּה בִּכְלָל, וּמֵעוֹלָם לֹא נִשְׁמַע עָלָיו שֵׁמֶץ דּוֹפִי, וְכֵן יֵשׁ כַּמָּה עֵדִים שֶׁרָאוּ אוֹתָהּ נִכְנֶסֶת לְבֵית הַנִּטְעָן הַנִּזְכָּר לְעֵיל אַחֲרֵי שֶׁפָּנְתָה תְּחִלָּה לְרְאוֹת בַּחוּץ אִם אֵין שָׁם אִישׁ וְנִשְׁאֲרָה שָׁם יוֹתֵר מִשָּׁעָה שֶׁלֹּא הָלְכָה לַחוּץ. אַף דְּיֵשׁ לְפַקְפֵּק עַל זֶה דְּלָא הֲוֵי יִחוּד, דְּשָׁמָא לֹא הָלְכָה לְבֵית הַחוֹרֶף שֶׁלּוֹ, אֶלָּא כְּמוֹ שֶׁהָלְכָה לְפָנֶיהָ תּוֹךְ הַבַּיִת כֵּן הָלְכָה לַאֲחוֹרֵי הַבַּיִת אוֹ שָׁמָא לֹא הָיָה אָז הַנִּטְעָן לְבַד בַּחֶדֶר, מִכָּל מָקוֹם לְפִי הַגָּדַת עֵדִים אֵלּוּ שֶׁאֲבִי הַנִּטְעָן הָיָה בְּעֵת הֲלִיכָתָהּ לְשָׁם בְּבֵית הַחוֹרֶף, וְאַחַר כָּךְ יָצָא לַחוּץ וּבָא אֶצְלָהּ בַּמָּקוֹם שֶׁהֵם שָׁם אָז, וּמוּכָח מִתּוֹכוֹ שֶׁהָיוּ מִתְיַחֲדִים בְּיִחוּד מַמָּשׁ, וְגַם עָשָׂה מַעֲשֵׂה זְנוּת וּלְפָחוֹת דְּבָרִים מְכֹעָרִים, וְכֵן יֶשְׁנוּ כַּמָּה נָשִׁים וּפְסוּלֵי עֵדוּת שֶׁרָאוּ אוֹתָם עוֹמְדִים בָּאַפֵּלָה זְמַן מָה, וְשֶׁהוּא תָּמִיד הוֹלֵךְ אֶצְלָהּ וְכֵן סִפְּרָה הָעַרְלִית לִפְנֵי כַּמָּה וְכַמָּה אֲנָשִׁים, שֶׁרָאֲתָה הַנִּטְעָן יוֹצֵא בְּהַשְׁכָּמָה מֵהַקאמער שֶׁלָּהּ, אַחֲרֵי שֶׁהוֹצִיא רֹאשׁוֹ לַחוּץ לִרְאוֹת אִם אֵין שָׁם אִישׁ. עוֹד הָעִידָה אֵשֶׁת הַשֵּׁנִי הַנִּזְכָּר לְעֵיל אִשָּׁה כְּשֵׁרָה שֶׁבַּחֹדֶשׁ הֶעָבַר שָׁלְחָה אוֹתָהּ אִם הַנֶּחְשֶׁדֶת לְהַמְיַלֶּדֶת עִם מֵי רַגְלַיִם שֶׁל הַנֶּחְשֶׁדֶת לִרְאוֹת אִם הִיא מְעוּבֶּרֶת וְהֵשִׁיבָה שֶׁהִיא מְעוּבֶּרֶת וְהִיא בְּחֹדֶשׁ שְׁלִישִׁי לְעִיבּוּרָהּ וְתֵלֵד בֵּן זָכָר, גַּם אֵם הַנֶּחְשֶׁדֶת הוֹדִית כֵּן. עוֹד הֵעִיד אָחִיו שֶׁל עֵד הַשֵּׁנִי הַנִּזְכָּר לְעֵיל עַל

the second witness have a bad reputation,[1] nevertheless this witness himself is not included among them, and no blemish was ever heard about him. And similarly, there are several witnesses who saw her entering the house of the aforementioned suspected man after she first turned to look outside to see if anyone was there, and she remained there for more than an hour without going outside. Although one could question this, saying that it was not seclusion, for perhaps she did not go to his winter room, but just as she went ahead into the house so too she went to the back of the house; or perhaps the suspected man was not alone in the room at the time. Nevertheless, according to the testimony of these witnesses, the father of the suspected man was in the winter room at the time she went there, and afterward he went outside and came to where she was in the place where they were then. And it is apparent from the circumstances that they were secluded in actual seclusion, and that he committed acts of immorality, or at least unseemly things. And likewise, there are several women and persons disqualified from testimony who saw them standing together in the dark for some time, and that he always goes to her. And similarly, the non-Jewish maidservant told before many people that she saw the suspected man leaving early in the morning from her [the woman's] chamber, after he stuck his head out to see whether anyone was there. Furthermore, the wife of the aforementioned second [witness], a proper woman, testified that in the previous month, the mother of the suspected woman sent her to the midwife with the urine of the suspected woman to see if she was pregnant, and she [the midwife] replied that she was pregnant and was in her third month of pregnancy and would bear a male child. Also, the mother of the suspected woman admitted this. Furthermore, the brother of the aforementioned second witness testified — when the beis din asked him how he knew what he had been saying in the streets and markets three or four months before her giving birth, that it was impossible that she would give birth before Purim — he replied that he had traveled with the suspected man three weeks after the festival, and he [the suspected man] was then in a state of anguish. "I asked him: 'Why has your face fallen? This can only be your distress regarding the aforementioned suspected woman.' He replied: 'I cannot understand her or her words. This week she wrote to me that she had her menstrual period close to the fes-

[1] Moed Katan 17a — The Gemara uses the expression *senu shumaneih* regarding those whose reputation is bad: הָהוּא צוּרְבָּא מֵרַבָּנַן דַּהֲווֹ סָנוּ שׁוּמְעָנֵיהּ.

tival of Shavuos. Now she writes that she has begun to become pregnant.' I said to him: 'Certainly she is pregnant from you, for her husband is not at home.' He replied: 'If I had wanted to do such a thing, I would have done so when she was still a virgin.'" He further testified that the suspected man himself told him that he forgot his garment in the bed of the suspected woman when he was at her place at night, and the next morning her mother found it in the bed and returned it to him. He further testified that she wrote to him several letters through her younger sister, and various other things she did that were improper. But there are grounds to argue that he [this brother-witness] is disqualified from testimony for several reasons. Also, the suspected man himself admitted that the suspected woman solicited him for immorality after her marriage, but he was not willing. And he said that in truth the child is a mamzer, but not from him; rather, it is from a non-Jew. Thus far the language of the question, letter by letter. First, let us consider — even if there were actual witnesses of defilement, whether the testimony would be sustained. For by law, one must collect testimony of defilement in the presence of the woman and in the presence of her husband, as stated in the Shulchan Aruch, Even HaEzer, Siman 11, Se'if 4, in the Rema's gloss,[2]

שֶׁשְּׁאָלוּהוּ הַבַּיִת דִּין מֵהֵיכָן יָדַע מַה שֶּׁאָמַר בָּרְחוֹבוֹת וּשְׁוָקִים שְׁלוֹשָׁה אוֹ ד' חֲדָשִׁים קֹדֶם לִדָּתָהּ שֶׁאִי אֶפְשָׁר שֶׁתֵּלֵד קֹדֶם פּוּרִים, הֵשִׁיב שֶׁהָלַךְ עִם הַנִּטְעָן שְׁלֹשָׁה שָׁבוּעוֹת אַחַר הֶחָג וְהָיָה אָז בְּדַאֲבוֹן נֶפֶשׁ שֶׁאֵלְתִּיו לָמָּה נָפְלוּ פָּנֶיךָ אֵין זֶה כִּי אִם עִצְבוֹנְךָ אוֹדוֹת הָאִשָּׁה הַנֶּחְשֶׁדֶת הַנִּזְכָּר לְעֵיל, הֵשִׁיב בַּל אוּכַל הָבִין אוֹתָהּ וְאֶת דְּבָרֶיהָ בְּשָׁבוּעַ זוֹ כָּתְבָה לִי שֶׁהָיָה לָהּ סֵדֶר נָשִׁים סָמוּךְ לְחַג שָׁבוּעוֹת, כָּעֵת כָּתְבָה שֶׁהִתְחִילָה לְהִתְעַבֵּר, אָמַרְתִּי לוֹ בְּוַדַּאי מִמְּךָ הִיא מְעוּבֶּרֶת, כִּי בַּעֲלָהּ אֵינוֹ בְּבֵיתוֹ, הֵשִׁיב אִם הָיִיתִי רוֹצֶה לַעֲשׂוֹת כָּכָה הָיִיתִי עוֹשֶׂה כַּאֲשֶׁר עוֹדֶנָּה הָיְתָה בְּתוּלָה. עוֹד הֵעִיד שֶׁהַנִּטְעָן בְּעַצְמוֹ סִיפֵּר לוֹ שֶׁשָּׁכַח מַלְבּוּשׁ שֶׁלּוֹ בְּמִטָּה שֶׁל הַנֶּחְשֶׁדֶת כְּשֶׁהָיָה בַּלַּיְלָה אֶצְלָהּ, וּלְמָחָר בְּהַשְׁכָּמָה מָצְאָה אִם הַנֶּחְשֶׁדֶת בַּמִּטָּה וְהֶחֱזִירָה לוֹ, עוֹד הֵעִיד שֶׁכָּתְבָה לוֹ כַּמָּה אִגְּרוֹת עַל יְדֵי אֲחוֹתָהּ הַקְּטַנָּה, וְעוֹד כַּמָּה דְּבָרִים שֶׁעָשְׂתָה שֶׁלֹּא כַּדָּת, אֲבָל יֵשׁ לִטְעוֹן עָלָיו שֶׁהוּא פָּסוּל לְעֵדוּת מִכַּמָּה טְעָמִים גַּם הוֹדָה הַנִּטְעָן בְּעַצְמוֹ שֶׁהַנֶּחְשֶׁדֶת תְּבָעָה אוֹתוֹ לִזְנוּת עִמָּהּ אַחַר הַנִּשּׂוּאִין, אֲבָל לֹא הָיָה רוֹצֶה, וְאָמַר שֶׁבֶּאֱמֶת הַוָּלָד מַמְזֵר אֲבָל לֹא מִמֶּנּוּ, וְאַךְ הוּא מִנְּכָרִי, עַד כָּאן לְשׁוֹן הַשְּׁאֵלַת אוֹת בְּאוֹת תְּחִלָּה נָבוֹא לָדוּן אַף אִם הָיוּ עֵדֵי טוּמְאָה מַמָּשׁ אִם הָיָה הָעֵדוּת מִתְקַיֵּים, כִּי מִדִּינָא צָרִיךְ לִגְבּוֹת עֵדֵי טוּמְאָה בִּפְנֵי הָאִשָּׁה וּבִפְנֵי בַּעֲלָהּ, כִּדְאִיתָא בְּשֻׁלְחָן עָרוּךְ אֶבֶן הָעֶזֶר (סִימָן י"א סְעִיף ד' בַּהֲגָהָה),

and its source is in the Rosh, Teshuvos, Klal 46, Siman 1.[3] **And even though Your Honor wrote to excuse himself, saying that the beis din sent for him [the husband] and he did not come**

וּמְקוֹרוֹ בְּהָרֹא"ש (בִּתְשׁוּבָה כְּלָל מ"ו סִימָן א') וְאַף שֶׁמַּעֲלַת כְּבוֹד תּוֹרָתוֹ כָּתַב לְהִתְנַצֵּל עַצְמוֹ, שֶׁהַבֵּית

[2] SA, Even HaEzer 11:4 — The Rema's gloss rules that testimony to forbid a woman must be accepted in the presence of both the woman and her husband: ומקורו בתשובת הרא"ש.

[3] Teshuvos HaRosh, Klal 46, Siman 1.

דִּין שָׁלְחוּ אַחֲרָיו וְלֹא בָא עַד כָּאן לְשׁוֹנוֹ, רְצוֹנוֹ דִּבְכַהֲאי גַּוְונָא לְפִי מִנְהָגֵינוּ דְּהֵיכִי דְּיֵשׁ בֵּית דִּין קָבוּעַ אֵינוֹ יָכוֹל לוֹמַר לְבֵית דִּין הַגָּדוֹל אָזִילְנָא מְקַבְּלִים שֶׁלֹּא בְּפָנַי בַּעַל דִּין, וּכְמוֹ בְּפָתָחוּ לוֹ בְדִינָא וְשָׁלְחוּ לוֹ וְלֹא בָא (וּכְמוֹ שֶׁכָּתַב בְּהַגָּהַת שָׁלְחָן עָרוּךְ חוֹשֶׁן מִשְׁפָּט סִימָן כ"ח סְעִיף ט"ז לְדַעַת הַיֵּשׁ אוֹמְרִים עַיֵּן שָׁם] אַךְ מִכָּל מָקוֹם הָא יֵשׁ לְחַלֵּק וְלוֹמַר דַּוְקָא בְּעֵדוּת מָמוֹן כֵּיוָן דְּשָׁלְחוּ לוֹ וְלֹא בָא, קְנָסוּהוּ חֲכָמֵינוּ וְכָרְעוּנָם לְבָרָכָה וְהִפְקִיעוּ לְמָמוֹנֵיהּ עַל יְדֵי קַבָּלַת הָעֵדוּת שֶׁלֹּא בְּפָנָיו, וְכִנְרֵאֶה מִמַּה שֶׁכָּתַב הָרַא"ש (בְּשׁוּ"ת כְּלָל הַנִּזְכָּר לְעֵיל סִימָן ו') וְזֶה לְשׁוֹנוֹ אֲבָל אִם הָיָה חוֹלֶה אוֹ עֵדִים חוֹלִים וְשָׁלְחוּ לֵיהּ וְלֹא בָא, כֵּיוָן דְּאִיכָּא הֶפְסֵד מָמוֹן לַתּוֹבֵעַ וְהִתְרוּ לְהַנִּתְבָּע וְלֹא בָא הִפְקִיעוּ לְמָמוֹנֵיהּ וְשַׁוְיָא לְהַאי עֵדוּת שֶׁלֹּא בְּפָנָיו לְעֵדוּת מַעֲלְיָא עַד כָּאן לְשׁוֹנוֹ, וְהוּבָא בְּבֵית יוֹסֵף (סִימָן כ"ח) וְהוּא הַדִּין הָכִי נָמֵי יֵשׁ לוֹמַר דִּבְשָׁלְחוּ לֵיהּ וְלֹא בָא לְחוּד הֵיכִי דְּאֵינוֹ יָכוֹל לוֹמַר לְבֵית דִּין הַגָּדוֹל אָזִילְנָא, הִפְקִירוּ לְמָמוֹנֵיהּ עַל יְדֵי קַבָּלַת עֵדוּת שֶׁלֹּא בְּפָנָיו, מַה שֶּׁאֵין כֵּן בְּעִידֵי אִיסּוּר, יֵשׁ לוֹמַר דִּלְעוֹלָם אֵין מְקַבְּלִין שֶׁלֹּא בְּפָנָיו, וּכְעֵין זֶה חִלֵּק הַתְּרוּמַת הַדֶּשֶׁן בְּפִסְקָיו (סִימָן קע"ז) וְזֶה לְשׁוֹנוֹ, וְאִם יֵשׁ בְּיַד חֲכָמֵינוּ זִכְרוֹנָם לִבְרָכָה מִכֹּחַ הֶפְקֵר בֵּית דִּין הֶפְקֵר לְקַנּוֹס אֶת הָאָלָם לְקַבֵּל הָעֵדוּת שֶׁלֹּא בְּפָנָיו, וְכִי מִשּׁוּם הָכִי יַפְקִיעוּ אֶתְתָּא (נִרְאֶה לִי דְּצָרִיךְ לוֹמַר עַבְדּוּ] שֶׁל זֶה וְהַתּוֹרָה אָמְרָה וְכוּ' עַיֵּן שָׁם,

— end quote. His intention is that in such a case, according to our custom, where there is a permanent beis din, [the defendant] cannot say "I will go to the great beis din," they accept [testimony] not in the presence of the litigant, analogous to the case where they opened proceedings against him, sent for him, and he did not come (as written in the Rema's gloss on Shulchan Aruch, Choshen Mishpat, Siman 28, Se'if 16,[4] according to the view of the Yesh Omrim — see there). However, nevertheless, one can distinguish and say that specifically regarding monetary testimony, since they sent for him and he did not come, the Sages penalized him and expropriated his money through accepting testimony not in his presence. The principle of *hefker beis din hefker* — the court has power to declare property ownerless — applies in monetary matters. **And this is apparent from what the Rosh wrote in his Teshuvos, the aforementioned Klal, Siman 6,[5] and this is his language: "But if he [the plaintiff] was sick or the witnesses were sick, and they sent for him [the defendant] and he did not come, since there is monetary loss for the plaintiff and they warned the defendant and he did not come, they expropriated his money and rendered this testimony [taken] not in his presence as valid testimony" — end quote. And this is cited by the Beis Yosef, Siman 28.[6] And the same reasoning applies here as well: that where they sent for him and he did not come alone — in a case where he cannot say "I will go to the great beis din" — they expropriated his money through accepting testimony not in his presence. But in testimony regarding prohibitions, one can say that they may never accept [testimony] not in his presence. And a similar distinction was drawn by the Terumos HaDeshen in his Pesakim, Siman 177,[7] and this is his language: "And if the Sages have the power through the principle of hefker beis din hefker to penalize the recalcitrant party by accepting testimony not in his presence, would they therefore release the woman (It seems to me that it should read: "his servant") "of this person, when the Torah stated [otherwise], etc." — see there.** The Terumos HaDeshen says *hefker beis din* cannot override a Torah prohibition. **And from this, the Rema derived in his Teshuvos, Siman 12,[8]**

[4]SA, Choshen Mishpat 28:16 — The Rema's gloss discusses accepting testimony when the opposing party refuses to appear.

[5]Teshuvos HaRosh, Klal 46, Siman 6 — The Rosh explains that when the Sages expropriated money (*hefker beis din hefker*), they rendered testimony accepted in the litigant's absence as valid testimony, specifically in cases of duress combined with the defendant's refusal to appear.

[6]Beis Yosef, Choshen Mishpat 28.

[7]Terumos HaDeshen, Pesakim, Siman 177.

[8]Responsa of Rema, Siman 12 — The Rema rules that accepting testimony to forbid a woman to her husband requires the same standards as capital cases, and *hefker beis din hefker* cannot override this requirement.

that the same applies to accepting testimony to forbid a woman to her husband: the recalcitrance [of the party] does not help [to validate testimony taken] not in the presence of the litigant, because it is comparable to testimony in capital cases. As the Rosh wrote in his Teshuvos: for this reason, examination and interrogation is required in testimony to forbid a woman to her husband — see there. If so, the same applies here: even though they sent for him and he did not come, it is not effective regarding witnesses of prohibition, for the principle of hefker beis din hefker does not apply in this context. And even more so regarding the fact that you accepted testimony not in the presence of her husband — this is certainly improper. For even though her husband is not in the city, and he is bound in chains by the judgment of civil law, (the husband is apparently imprisoned or detained by the secular authorities) **nevertheless, aside from the possibility of judging such a case similarly — just as the Rosh holds in his approach in the aforementioned Teshuvah, that two conditions are required — duress [preventing the plaintiff or witnesses from coming] and the defendant being sent for and not coming — for it is merely a rabbinical enactment to expropriate money in such a case, so too one can say according to those other poskim who hold that duress alone suffices to accept testimony not in his presence — this too is for the betterment of society, out of concern for the monetary loss of the plaintiff, and from the rule of hefker beis din hefker. But in testimony to forbid her to her husband, which is comparable to capital cases,** the power of *hefker beis din* cannot be invoked. **Also, even if we compare prohibition cases to monetary cases, nevertheless, the logic of duress is only due to the concern that before the duress passes, the testimony will be lost, such as when [the plaintiff] is sick or the witnesses are sick, where there is concern that perhaps the moment will come that they die, or like the case of witnesses who are hurrying to travel overseas. But in our case, as it appears, the witnesses are local residents and are not hurrying to travel overseas. If so, what does it matter that the defendant is not in the city? Let them wait until he comes and accept the testimony in his presence. And it seems to me that there is proof for our reasoning above, that regarding witnesses for prohibitory matters, even in a case of duress, they do not accept [testimony] not in his presence. This is from what the Rashba wrote in his Chiddushim on Bava Kamma, at**

וּמִזֶּה לָמַד הָרַמְ"א בִּתְשׁוּבָה (סִימָן י"ב) דְּהוּא הַדִּין לְקַבָּלַת עֵדוּת לֶאֱסוֹר אִשָּׁה לְבַעְלָהּ לֹא מְהַנֵּי אַלְמוּתָא שֶׁלֹּא בִּפְנֵי בַּעַל דִּין, דִּכְעֵדֵי נְפָשׁוֹת דָּמֵי, כְּמוֹ שֶׁכָּתַב הָרֹא"ש בִּתְשׁוּבָה דְּמֵהַאי טַעְמָא בָּעֵי דְּרִישָׁה וַחֲקִירָה בְּעֵדוּת לֶאֱסוֹר אִשָּׁה לְבַעְלָהּ, עַיֵּן שָׁם, אִם כֵּן הָכִי נָמֵי יֵשׁ לוֹמַר דְּאַף דְּשָׁלְחוּ לוֹ וְלֹא בָּא לֹא מְהַנֵּי בְּעִידֵי אִיסּוּר, דְּלֹא שַׁיָּיךְ בָּזֶה הֶפְקֵר בֵּית דִּין הֶפְקֵר וּבְיוֹתֵר בְּמַה דְּקַבָּלְתָּם עֵדוּת שֶׁלֹּא בִּפְנֵי בַּעְלָהּ, זֶהוּ בְּוַדַּאי אֵינוֹ נָכוֹן, דְּאַף דְּבַעְלָהּ אֵינוֹ בָּעִיר, וְהוּא אָסוּר בְּזִיקִים בְּמִשְׁפַּט דִּינָא דְּמַלְכוּתָא, מִכָּל מָקוֹם מִלְּבַד דְּיֵשׁ לָדוּן גַּם כֵּן כְּהַאי גַּוְונָא כִּי הֵיכִי דְּסָבִירָא לֵיהּ לְהָרֹא"שׁ בְּשִׁיטָתֵיהּ בִּתְשׁוּבָה הַנִּזְכָּר לְעֵיל דְּבָעֵי תַּרְתֵּי, אוֹנֶס וְשָׁלְחוּ לוֹ וְלֹא בָּא, דַּהֲוֵי רַק תַּקָּנַת חֲכָמֵינוּ זִכְרוֹנָם לִבְרָכָה לְאַפְקוּעֵי לְמָמוֹנָא כְּהַאי גַּוְונָא, הָכִי נָמֵי יֵשׁ לוֹמַר לְאִינָךְ פּוֹסְקִים דְּאוֹנֶס לְחוּד מְהַנֵּי לְקַבֵּל הָעֵדוּת שֶׁלֹּא בְּפָנָיו הוּא גַּם כֵּן תִּיקּוּן הָעוֹלָם, מֵחֲשָׁשָׁא דְּפִסְידָא דְּמָמוֹן הַתּוֹבֵעַ וּמִדִּין הֶפְקֵר בֵּית דִּין הֶפְקֵר, מַה שֶּׁאֵין כֵּן בְּעֵדִים לְאָסְרָהּ עַל בַּעְלָהּ דְּכִנְפָשׁוֹת דָּמֵי, גַּם אַף אִם נְדַמֶּה אִיסּוּר לְמָמוֹן, מִכָּל מָקוֹם הַסְּבָרָא דְּאוֹנְסָא רַק מֵחֲשָׁשָׁא דְּקוֹדֶם שֶׁיַּעֲבוֹר הָאוֹנֶס יוּפְסַד הָעֵדוּת כְּמוֹ בְּחָלָה אוֹ בְּעֵדִים חוֹלִים דְּאִיכָּא חֲשָׁשָׁא דְּאוּלַי תִּטָּרֵף הַשָּׁעָה שֶׁיָּמוּתוּ, וּכְהַהִיא דְּעֵדִים דְּרוּפִים לֵילֵךְ לִמְדִינַת הַיָּם, מַה שֶּׁאֵין כֵּן בִּנְדוֹן דִּידָן דְּכִפְי הַנִּרְאֶה הָעֵדִים הֵם מֵאַנְשֵׁי הָעִיר וְאֵינָם רְדוּפִים לֵילֵךְ לִמְדִינַת הַיָּם, אִם כֵּן מַה בְּכָךְ שֶׁאֵין הַנִּתְבָּע בָּעִיר, יַמְתִּינוּ עַד שֶׁיָּבֹא וְיִקַּבְּלוּ הָעֵדוּת בְּפָנָיו וְנִרְאֶה לִי רְאָיָה לִסְבָרָתֵינוּ הַנִּזְכָּר לְעֵיל, דִּבְעִידֵי אִיסּוּר אַף בִּמְקוֹם אוֹנֶס אֵין מְקַבְּלִין שֶׁלֹּא בְּפָנָיו, מִמַּה שֶּׁכָּתַב הָרַשְׁבָּ"א בְּחִידּוּשֵׁי בָּבָא קַמָּא רֵישׁ

the beginning of the chapter "HaGozel Basra,"[9] and this is his language: "And it is difficult for us regarding our sugya: Behold, we say the reason that testimony is not accepted not in the presence of the litigant is because the verse states: 'And it was testified to its owner'[10] — if so, when he is sick, etc., how can they accept [testimony]? The Torah stated: 'And it was testified to its owner'! And he answered that the primary verse is written regarding the ox which is like capital cases, but in monetary cases, it is merely an asmachta (rabbinical support) and rabbinic in nature" — end quote. Thus it is clarified from this that in capital cases, where the Torah requires [testimony] in his presence, even in a case of duress, they do not accept [testimony] not in his presence. If so, the same applies to forbidding a woman to her husband, which is comparable to capital cases, as the Rema wrote in the aforementioned Teshuvos.

However, to the contrary — not only does this not support me, but it is actually a refutation of our position. For the Rema explained in the aforementioned Teshuvos: the fact that regarding examination and interrogation and regarding acceptance of testimony in his presence, we compare testimony concerning women to testimony in capital cases, while regarding separate testimony, we compare it to monetary testimony. That is, regarding separate testimony — which we derive in the first chapter of Makkos[11] from the verse "He shall not be put to death on the testimony of one witness" — and from the Torah, this applies only to capital cases, since "he shall not be put to death" is written. Therefore, testimony concerning women is compared to monetary [testimony]. But regarding examination and interrogation and acceptance of testimony in his presence, which from basic principles should also apply in monetary cases, and only the Sages were lenient in monetary matters — therefore testimony concerning women is compared to capital cases — see there. Thus his entire foundation is that from the Torah, also in monetary cases, acceptance of testimony in his presence is required. But according to the view of the aforementioned Rashba, who holds that from the Torah, only in capital cases is [testimony] in his presence required, but in monetary cases it is only

פֶּרֶק הַגּוֹזֵל בַּתְּרָא, וְזֶה לְשׁוֹנוֹ, וְקַשְׁיָא לַן אַשְׁמַעְתִּין הָא אָמְרִינַן טַעְמָא דְּאֵין מְקַבְּלִין עֵדוּת שֶׁלֹּא בִּפְנֵי בַּעַל דִּין, מִשּׁוּם דְּאָמַר קְרָא וְהוּעַד בִּבְעָלָיו וְאִם כֵּן אִם הוּא חוֹלֶה וְכוּ' הֵיאַךְ מְקַבְּלִין, וְהַתּוֹרָה אָמְרָה וְהוּעַד בִּבְעָלָיו, וְתֵירֵץ דְּעִיקַּר קְרָא לְגַבֵּי שׁוֹר כְּתִיב דְּהוּא כְּדִינֵי נְפָשׁוֹת, אֲבָל בְּדִינֵי מָמוֹנוֹת אַסְמַכְתָּא בְּעָלְמָא הוּא וּמִדְּרַבָּנָן עַד כָּאן לְשׁוֹנוֹ, הֲרֵי מַתְבָּאֵר מִזֶּה דִּבְדִינֵי נְפָשׁוֹת דְּמֵי הַתּוֹרָה בָּעֵי בְּפָנָיו אַף בִּמְקוֹם אוֹנֶס אֵין מְקַבְּלִין שֶׁלֹּא בְּפָנָיו אִם כֵּן הָכִי נָמֵי לֶאֱסוֹר אִשָּׁה לְבַעְלָהּ דְּכִנְפָשׁוֹת דָּמֵי כְּמוֹ שֶׁכָּתַב הָרַמְ"א בַּשּׁו"ת הַנְּזָכָר לְעֵיל

אוּלָם אַדְּרַבָּא לֹא מִבָּעֵי דְּלֹא מְסַתַּיֵּיע לִי, אֶלָּא אַף תְּיוּבְתָּא הֲוֵי לִדְבָרֵינוּ, לְמָה דְּבֵיאֵר הָרַמְ"א בַּשּׁו"ת הַנְּזָכָר לְעֵיל הָא דִּלְעִנְיַן דְּרִישָׁה וַחֲקִירָה וּלְעִנְיַן קַבָּלַת עֵדוּת בְּפָנָיו מְדַמִּינַן עֵדוּת נָשִׁים לְעֵדוּת נְפָשׁוֹת, וּלְעִנְיַן עֵדוּת מְיֻחֶדֶת מְדַמִּינַן לְעֵדוּת מָמוֹן, הַיְינוּ דִּלְעֵדוּת מְיֻחֶדֶת דְּיַלְפִּינַן לָהּ בְּפֶרֶק קַמָּא דְּמַכּוֹת מִקְּרָא דְּלֹא יוּמַת עַל פִּי עֵד אֶחָד, וּמִן הַתּוֹרָה הוּא רַק בִּנְפָשׁוֹת דְּלֹא יוּמַת כְּתִיב מִשּׁוּם הָכִי עֵדוּת נָשִׁים לְמָמוֹן דָּמְיָא מַה שֶּׁאֵין כֵּן לְעִנְיַן דְּרִישָׁה וַחֲקִירָה וְקַבָּלַת עֵדוּת בְּפָנָיו, דְּמֵהֵיכִי תֵּיתֵי גַּם בְּמָמוֹן כֵּן הוּא, וְרַק חָכְמֵינוּ זִכְרוֹנָם לִבְרָכָה הֵקִילוּ בְּמָמוֹן, מִשּׁוּם הָכִי עֵדוּת נָשִׁים לִנְפָשׁוֹת דָּמְיָא עַיֵּין שָׁם, הֲרֵי דְּכָל יְסוֹדוֹ דְּמִן הַתּוֹרָה גַּם בְּמָמוֹן בָּעֵי קַבָּלַת עֵדוּת בְּפָנָיו, מַה שֶּׁאֵין כֵּן לְדַעַת הָרַשְׁבָּ"א הַנְּזָכָר לְעֵיל דְּמִן הַתּוֹרָה דַּוְקָא בִּנְפָשׁוֹת הוּא דְּבָעֵי בְּפָנָיו, אֲבָל

[9] Rashba, Chiddushei Bava Kamma, beginning of Perek HaGozel Basra (approximately 112a) — The Rashba asks how testimony can be accepted without the litigant present when the verse "v'hu'ad bi'v'alav" (Shemos 21:29) requires his presence, and answers that the verse applies biblically only to capital cases (the goring ox), while in monetary cases it is merely rabbinic.

[10] Shemos 21:29.

[11] Makkos 6a — The Gemara derives the requirement of *edus meyuchedeS* from the verse "He shall not be put to death on the testimony of one witness" (Devarim 17:6): אָמַר רַבִּי יוֹסֵי: בַּמֶּה דְּבָרִים אֲמוּרִים – בְּדִינֵי נְפָשׁוֹת.

rabbinic, then one can say that testimony concerning women is comparable to monetary [testimony] just as regarding separate testimony. And in a case of duress, they accept [testimony] not in his presence, just as in monetary cases. And this is further supported by what the Beis Yosef wrote in Choshen Mishpat, Siman 388, from section 8,[12] citing the Rashba at length. And this is his language there: "And in addition to this, sometimes they accept testimony not in the presence of the litigant, for they said: 'If he was sick, etc.' And if you wish to say that they only said this regarding monetary cases, but in capital cases they do not accept [testimony] not in his presence — this is not so, etc." Thus he holds that even in capital cases, they accept in a case of duress, [testimony] not in his presence. If so, a fortiori [the same applies] to forbidding a woman to her husband. However, it appears to my humble opinion that these words of the Rashba in his Teshuvos contradict his words in his Chiddushim. For according to his words in his Chiddushim, certainly the law is that in capital cases, where the Torah requires [testimony] in his presence, duress does not help. But according to his Teshuvos, even in capital cases duress helps. Nevertheless, we hold at least according to the Rashba's view, that regarding testimony to forbid a woman to her husband, in a case of duress they accept [testimony] not in the presence of the litigant. For according to his Teshuvos, even in actual capital cases they accept, how much more so regarding testimony about women to forbid her to her husband. And according to his Chiddushim mentioned above, since from the Torah, only in capital cases [is testimony in his presence required], one can say that testimony concerning women is compared to monetary [testimony], as noted above. Except according to the view of the Rosh in the aforementioned Teshuvah — it seems to me clearly, from the fact that he needed to say that the Sages expropriated his money to render testimony [accepted] not in his presence as valid testimony — from this it is apparent that the Rosh holds that from the Torah, even in monetary cases we require acceptance of testimony in his presence, and it is only an expropriation by the Sages through their enactment. And if so, regarding testimony about women, where hefker beis din hefker does not apply, one can say that [testimony] in his presence is always specifically required. And see the Beis Yosef, Choshen Mishpat,

בְּמָמוֹן הוּא רַק דְּרַבָּנָן, אִם כֵּן יֵשׁ לוֹמַר דְּעֵדוּת נָשִׁים דָּמֵי לְמָמוֹן כְּמוֹ לְעִנְיַן עֵדוּת מְיֻחֶדֶת, וּבְמָקוֹם אוֹנֶס מְקַבְּלִין שֶׁלֹּא בְּפָנָיו כְּמוֹ בְּמָמוֹן וּבְיוֹתֵר לְמוֹ שֶׁכָּתַב הַבֵּית יוֹסֵף חֹשֶׁן מִשְׁפָּט (סִימָן שפ"ח מְחֻדָּשׁ ח') בְּשֵׁם הָרַשְׁבָּ"א בַּאֲרֻכָּה, וְזֶה לְשׁוֹנוֹ שָׁם וְנוֹסָף עַל זֶה דְּלִפְעָמִים מְקַבְּלִים עֵדוּת שֶׁלֹּא בִּפְנֵי בַּעַל דִּין, שֶׁהֲרֵי אָמְרוּ הָיָה חוֹלֶה וְכוּ', וְאִם נַפְשְׁךָ לוֹמַר שֶׁלֹּא אָמְרוּ אֶלָּא בְּדִינֵי מָמוֹנוֹת אֲבָל בְּדִינֵי נְפָשׁוֹת אֵין מְקַבְּלִין שֶׁלֹּא בְּפָנָיו, לֹא הִיא וְכוּ', הֲרֵי דִּסְבִירָא לֵיהּ דְּאַף בְּנְפָשׁוֹת מְקַבְּלִים בְּמָקוֹם אוֹנֶס שֶׁלֹּא בְּפָנָיו, אִם כֵּן קַל וָחוֹמֶר לֶאֱסוֹר אִשָּׁה עַל בַּעְלָהּ הֵן זֹאת נִרְאֶה לַעֲנִיּוּת דַּעְתִּי דְּדִבְרֵי הָרַשְׁבָּ"א אֵלּוּ בִּתְשׁוּבָה סוֹתְרִים לִדְבָרָיו בְּחִידּוּשֵׁי דִּלְדְבָרָיו בְּחִידּוּשָׁיו בְּוַדַּאי הַדִּין דִּבְנְפָשׁוֹת דְּמִן הַתּוֹרָה בָּעֵי בְּפָנָיו לָא מְהַנֵּי אוּנְסָא, וּלְדִבְרָיו בִּתְשׁוּבָה גַּם בִּנְפָשׁוֹת מְהַנֵּי אוּנְסָא, מִכָּל מָקוֹם נְקִיטְנָא מִיהָא לְדַעַת הָרַשְׁבָּ"א בְּעֵדוּת לֶאֱסוֹר אִשָּׁה עַל בַּעְלָהּ בְּמָקוֹם אוֹנֶס מְקַבְּלִים שֶׁלֹּא בִּפְנֵי בַּעַל דִּין, דִּלְדִבְרָיו בִּתְשׁוּבָה דַּאֲפִלּוּ בִּנְפָשׁוֹת מַמָּשׁ מְקַבְּלִים, מִכָּל שֶׁכֵּן בְּעֵדוּת נָשִׁים לְאָסְרָהּ עַל בַּעְלָהּ, וּלְדִבְרָיו בְּחִדּוּשָׁיו הַנִּזְכָּר לְעֵיל, כֵּיוָן דְּמִן הַתּוֹרָה רַק בִּנְפָשׁוֹת יֵשׁ לוֹמַר דְּעֵדוּת נָשִׁים כְּמָמוֹן דָּמֵי וְכַנִּזְכָּר לְעֵיל זוּלַת לְדַעַת הָרֹא"שׁ בִּתְשׁוּבָה הַנִּזְכָּר לְעֵיל נִרְאֶה לִי בָּרוּר מִדְּהוּצְרַךְ לוֹמַר דַּחֲכָמֵינוּ זִכְרוֹנָם לִבְרָכָה הִפְקִיעוּ לְמָמוֹנֵיהּ לְשַׁוְיָא קַבָּלַת עֵדוּת שֶׁלֹּא בְּפָנָיו עֵדוּת מַעַלְיָא מִזֶּה מְבֹאָר דְּסָבִירָא לֵיהּ לְהָרֹא"שׁ דְּמִן הַתּוֹרָה אַף בְּמָמוֹן בָּעִינַן קַבָּלַת עֵדוּת בְּפָנָיו, וְרַק הַפְקָעַת חֲכָמֵינוּ זִכְרוֹנָם לִבְרָכָה מִתַּקָּנַת חֲכָמֵינוּ זִכְרוֹנָם לִבְרָכָה הוּא, וְאִם כֵּן בְּעֵדוּת נָשִׁים דְּלָא שַׁיְיךְ הֶפְקֵר

[12] Beis Yosef, Choshen Mishpat 388, Section 8, citing the Rashba's Teshuvos at length.

בֵּית דִּין הֶפְקֵר יֵשׁ לוֹמַר דְּלְעוֹלָם בָּעֵי בְּפָנָיו דַּוְקָא, וְעַיֵּין בְּבֵית יוֹסֵף חוֹשֶׁן מִשְׁפָּט (סִימָן כ"ח) אַחַר שֶׁהֵבִיא דִּבְרֵי הָרַאֲבָ"ן שֶׁהוֹכִיחַ מִדְּמַקַּבְּלִין עֵדוּת שֶׁלֹּא בְּפָנָיו בְּמָקוֹם אוּנֶס, מוּכָח דְּבִדְעֵיבַד מְהַנֵּי קַבָּלַת עֵדוּת שֶׁלֹּא בְּפָנָיו, וְכָתַב עָלָיו הַבַּיִת יוֹסֵף וְזֶה לְשׁוֹנוֹ וְהָרֹא"שׁ בִּפְסָקָיו גַּם בְּתִשׁוּבָה לֹא כָתַב אֶלָּא סְבָרַת רִיבָ"א דַּאֲפִלּוּ דִּיעֲבַד פָּסוּל, וְטַעֲנַת הָרַאֲבָ"ן דְּהוּא מִדְּרַבָּנָן וּקְרָא אַסְמַכְתָּא, וְהֵם אָמְרוּ דְּבִמְקוֹם אוּנֶס מְקַבְּלִין וּבְלֵיכָא אוּנֶס אֲפִלּוּ דִּיעֲבַד פָּסוּל וְכֵן כָּתַב הר"י דוּדִי בְּשֵׁם הָרַשְׁבָּ"א, עַד כָּאן לְשׁוֹנוֹ, וְתָמַהּ לִי מְאֹד דַּהֲרֵי דִּבְרֵי הָרֹא"שׁ בְּתִשׁוּבָה בָּרוּר מִילְּלוּ, דְּסָבִירָא לֵיהּ דְּמִן הַתּוֹרָה בָּעֵי בְּפָנָיו וְהר"ר דוֹרָא"ן שֶׁכֵּן כָּתַב בְּשֵׁם הָרַשְׁבָּ"א אֶפְשָׁר דְּהַיְינוּ בְּשִׁיטַת הָרַשְׁבָּ"א בְּחִדּוּשָׁיו הַנִּזְכָּר לְעֵיל דְּבְדִינֵי מָמוֹנוֹת הֲוֵי רַק אַסְמַכְתָּא, אֲבָל הָרֹא"שׁ בְּוַדַּאי לֹא סָבִירָא לֵיהּ כֵּן וְכַנִּזְכָּר לְעֵיל, וְהַבַּיִת יוֹסֵף בְּעַצְמוֹ הֵבִיא שָׁם דִּבְרֵי הָרֹא"שׁ הַנִּזְכָּר לְעֵיל, וְגַם אַמַּאי סָנֵי לֵיהּ לְהַבַּיִת יוֹסֵף בְּטַעַם הָרֹא"שׁ בִּפְשׁוּטוֹ דְּבָאוּנֶס הִפְקִיעוּ חֲכָמֵינוּ זִכְרוֹנָם לִבְרָכָה לְמָמוֹנֵיהּ לְשַׁוְיָא עֵדוּת שֶׁלֹּא בְּפָנָיו עֵדוּת מַעֲלָיָא, אֲבָל שֶׁלֹּא בְּמָקוֹם אוּנֶס דְּלָא הִפְקִיעוּ קַיְימָא אַדְאוֹרַיְיתָא, דְּהָעֵדוּת לָאו כְּלוּם הוּא, אֶלָּא אִם כֵּן הָיָה בִּפְנֵי בַּעַל דִּין וְצָרִיךְ עִיּוּן גָּדוֹל וּמָצָאתִי אַחַר כָּךְ בְּתִשׁוּבַת הָרַדְבָּ"ז (סִימָן ז') וְזֶה לְשׁוֹנוֹ, וְכַד מְעַיְינַת שַׁפִּיר תִּשְׁכַּח דְּאַף עַל גַּב דְּלָא בָּעֵי שְׁלִחוּ לוֹ וְלֹא בָּא בַּהֲדֵי הָנָךְ, חֲדָא מֵהָנָךְ מִיהָא בָּעֵי אֲבָל הֵיכָא דְּאֵין הַתּוֹבֵעַ חוֹלֶה וְגַם אֵין הָעֵדִים מְבַקְּשִׁין לֵילֵךְ לְמִדִינַת הַיָּם לְכוּלֵי עָלְמָא אֵין

Siman 28, after he cited the words of the Ra'avan[13] who proved from the fact that testimony is accepted not in his presence in a case of duress that b'dieved (after the fact), acceptance of testimony not in his presence is effective. And the Beis Yosef wrote concerning this, and this is his language: "And the Rosh in his rulings, also in his Teshuvah, wrote only the reasoning of the Riva that even b'dieved it is invalid. And the claim of the Ra'avan is that it [the requirement] is rabbinic and the verse is an asmachta, and they [the Sages] said that in a case of duress they accept, but without duress, even b'dieved it is invalid. And so wrote R. Yitzchak Duran in the name of the Rashba" — end quote.[14] And I am very perplexed, for the words of the Rosh in his Teshuvah are crystal clear: that he holds the requirement for [testimony] in his presence is from the Torah. And R. Duran who wrote this in the name of the Rashba — this is possibly in accordance with the Rashba's approach in his Chiddushim mentioned above that in monetary cases it is only an asmachta. But the Rosh certainly does not hold this way, as noted above. And the Beis Yosef himself cited there the aforementioned words of the Rosh. And also, why does the Beis Yosef find the Rosh's reasoning unacceptable in its straightforward sense? That in a case of duress, the Sages expropriated his money to render testimony not in his presence as valid testimony, but where there is no duress and they did not expropriate, it remains at the Torah-level [requirement], and the testimony has no validity, unless it was in the presence of the litigant — and this requires great investigation. And I subsequently found in the Teshuvos of the Radbaz, Siman 7,[15] and this is his language: "And when you examine carefully, you will find that even though we do not require 'they sent for him and he did not come' together with those [other conditions], at least one of those [conditions] is required. But where the plaintiff is not sick and the witnesses are also not seeking to travel overseas, all agree they do not accept [testimony] even where the defendant is not in the city, etc. Furthermore, there is reason to invalidate this testimony because it is to forbid a woman and it is like capital cases, and even if [a party] is sick they do not accept [testimony]" — end quote. And therefore, in my humble opinion, this matter — accepting testimony to forbid a woman to her husband not in the

[13]Ra'avan — The Ra'avan holds that acceptance of testimony not in the litigant's presence is only a rabbinic requirement, and the verse is merely an *asmachta*; therefore, where the Sages enacted acceptance in cases of duress, *b'dieved* the testimony is valid.

[14]R. Yitzchak Duran (Rivash's student or the author of the Tashbetz).

[15]Teshuvos Radbaz, Siman 7.

presence of the litigant in a case of duress —

מְקַבְּלִין אַף הֵיכִי דְּהַנּוּתְבָע אֵינוֹ בָּעִיר וכו', וְתוּ אֵיכָא לְמִפְסַל הַךְ סָהֲדוּתָא מִשּׁוּם דְּהוּא לְמֵיסַר אִתְּתָא וַהֲוֵי כְּדִינֵי נְפָשׁוֹת, וַאֲפִלּוּ חָלָה אֵין מְקַבְּלִין, עַד כָּאן לְשׁוֹנוֹ, וּלְפִי זֶה לַעֲנִיּוּת דַּעְתִּי דָּבָר זֶה לְקַבֵּל עֵדוּת לֶאֱסוֹר אִשָּׁה עַל בַּעְלָהּ שֶׁלֹּא בִּפְנֵי בַּעַל דִּין בְּמָקוֹם אוּנֶס

depends on the dispute between the Rosh and the Rashba mentioned above, as we have explained. In any event, in our case, where it was possible to wait until the husband comes, the beis din did not have proper authority to accept testimony not in the presence of the husband. Also, now that the act has already been done, there is much to discuss. For the opinion of most poskim is that even b'dieved, it is not effective — acceptance of testimony not in the presence of the litigant. As the Maharshal elaborated in his Teshuvos, Siman 33,[16] and the Rema in the aforementioned Teshuvah added that to forbid her to her husband, which is comparable to capital cases, all agree that even b'dieved it is not effective. And so wrote straightforwardly the Teshuvos Panim Me'iros, Volume 1, Siman 24,[17] and so wrote the Teshuvos Avodas HaGershuni, Siman 3.[18] And even according to what I wrote above, that according to the Rashba in his Chiddushim, one can say that regarding acceptance of testimony not in his presence, testimony concerning women is compared to monetary [testimony], nevertheless, the Rashba is among those who hold that even in monetary cases, b'dieved the testimony is not effective. For even though they sent for her [the woman] and she did not come, nevertheless one can say that since by law the beis din should not have accepted the testimony since it was not in the presence of her husband, as noted above, therefore she acted properly in not wanting to come for acceptance of testimony in her presence but not in the presence of her husband, and one cannot penalize her for this, and even with respect to her, the acceptance of testimony is not effective. However, despite all this, it is difficult for me to be lenient b'dieved, for the view of the Ra'avan and his supporters is that b'dieved, acceptance of testimony not in his presence is effective, and perhaps even to forbid her to her husband as well. And this is the view of the sage Rabbi Naftali Hertz in the

תַּלְיָא בְּמַחֲלֹקֶת הָרֹא"שׁ וְהָרַשְׁבָּ"א הַנִּזְכָּר לְעֵיל וּכְמוֹ שֶׁבֵּאַרְנוּ, עַל כָּל פָּנִים בְּנִדּוֹן דִּידַן דְּהָיָה אֶפְשָׁר לְהַמְתִּין עַד שֶׁיָּבֹא הַבַּעַל, לֹא הָיָה כֹּחַ בְּיַד הַבֵּית דִּין יָפֶה לְקַבֵּל עֵדוּת שֶׁלֹּא בִּפְנֵי הַבַּעַל. גַּם עַתָּה שֶׁכְּבָר נַעֲשָׂה מַעֲשֶׂה, יֵשׁ לָדוּן טוּבָא, דַּהֲרֵי דַּעַת רֹב הַפּוֹסְקִים דַּאֲפִלּוּ דִּיעֲבַד לֹא מְהַנֵּי קַבָּלַת עֵדוּת שֶׁלֹּא בִּפְנֵי בַּעַל דִּין, וּכְמוֹ שֶׁהֶאֱרִיךְ מַהֲרַשַׁ"ל בְּשׁוּ"ת (סִימָן ל"ג) וּבְרַמָ"א בְּתְשׁוּבָה הַנִּזְכָּר לְעֵיל הוֹסִיף דְּלָאֲסָרָהּ עַל בַּעְלָהּ דְּכִנְפָשׁוֹת דָּמֵי לְכוּלֵי עָלְמָא אֲפִלּוּ דִּיעֲבַד לֹא מְהַנֵּי, וְכֵן כָּתַב בְּפִשְׁיטוּת בְּתְשׁוּבַת פָּנִים מְאִירוֹת (חֵלֶק א' סִימָן כ"ד), וְכֵן כָּתַב בְּתְשׁוּבַת עֲבוֹדַת הַגֵּרְשׁוּנִי (סִימָן ג'), וְאַף לְפִי מַה שֶּׁכָּתַבְתִּי לְעֵיל דלהרשב"א בְּחִידּוּשָׁיו יֵשׁ לוֹמַר דְּלְעִנְיַן קַבָּלַת עֵדוּת שֶׁלֹּא בְּפָנָיו עֵדוּת נָשִׁים לְמָמוֹן מְדַמִּינַן, מִכָּל מָקוֹם הָא הרשב"א מִכַּת הַסּוֹבְרִים דְּאַף בְּמָמוֹן דִּיעֲבַד לָא מְהַנֵּי הָעֵדוּת, דְּאַף דְּשָׁלְחוּ לָהּ וְלֹא בָּאָה מִכָּל מָקוֹם יֵשׁ לוֹמַר כֵּיוָן דְּמִדִּינָא לֹא הָיָה רָאוּי לְהַבֵּית דִּין לְקַבֵּל הָעֵדוּת כֵּיוָן שֶׁהוּא שֶׁלֹּא בִּפְנֵי בַּעְלָהּ וְכִנּוּזָכָר לְעֵיל, אִם כֵּן עָשְׂתָה כַּדִּין בְּמַה שֶּׁלֹּא רָצְתָה לָבֹא לְקַבָּלַת עֵדוּת בְּפָנָיהּ שֶׁלֹּא בִּפְנֵי בַּעְלָהּ וְלֵיכָא לְמִקְנְסָהּ עַל זֶה, וְאַף לְגַבֵּי דִּידָהּ לָא מְהַנֵּי הַקַּבָּלַת עֵדוּת. אוּלָם עִם

[16] Teshuvos Maharshal, Siman 33.
[17] Teshuvos Panim Me'iros, Volume 1, Siman 24.
[18] Teshuvos Avodas HaGershuni, Siman 3.

aforementioned Teshuvah of the Rema.[19] Also, what I wrote above — that even though according to the Rashba in his Chiddushim, one can say testimony concerning women is like monetary [testimony], nevertheless the Rashba is among those who hold that even in monetary cases it is not effective b'dieved — this is not conclusive. For on the other hand, one can say: since according to the Rashba in his aforementioned Chiddushim, the entire obligation of accepting testimony in his presence in monetary cases is only rabbinic, then one can say that specifically in monetary cases they strengthened their enactment so that even b'dieved it is not effective, but to forbid her to her husband, they left it at the Torah-level law, and the acceptance of testimony is effective b'dieved. Also, in the Shitah Mekubetzes on Bava Kamma, at the beginning of the chapter "HaGozel Basra," he wrote in the name of the Me'iri, and this is his language:[20] "And so they agreed that in matters of prohibition, they accept testimony not in his presence, such as where witnesses testified not in her presence that she became betrothed to another, or that his ritually pure items became contaminated, for it is a benefit to him to be separated from prohibition" — end quote. If so, seemingly also to forbid her to her husband, the same applies, for it is a benefit to him. Informing a husband of his wife's defilement separates him from prohibition. Although it appears that this is not the halachah, for most poskim disagree with this. As I saw in the Teshuvos of Mahariy Adribi,[21] and this is his language: "And so it appears from the Teshuvos of the Rivash regarding the betrothal of Morina. And I testify that so it was in the time of our teacher R. Yaakov Beirach, of blessed memory, concerning an incident, and like them [ruled] Ben Sid, of blessed memory. Except that they went too far in accepting testimony not in the presence of the litigant to forbid her to her husband, and I and my colleagues disagreed with them on this. But regarding testimony that she was betrothed, they accept [not in his presence]" — end quote. Thus the consensus of these Geonim, of blessed memory, is that to forbid her to her husband, they do not accept [testimony] not in his presence, in accordance with the view of the Rosh in the aforementioned Teshuvah. And in accordance with their view, the Rema ruled for us in his gloss on the Shulchan Aruch, Siman 11, Se'if 4. If

כָּל זֶה קָשֶׁה לִי לְהָקֵל בְּדִיעֲבַד, כִּי דַּעַת הראב"ן וְסַיְיעְתּוֹ דְּבִדְיעֲבַד מְהַנֵּי קַבָּלַת עֵדוּת שֶׁלֹּא בְּפָנָיו וְאוּלַי גַּם לְאָסְרָהּ עַל בַּעְלָהּ כֵּן, וְזֶהוּ דַּעַת הֶחָכָם רַבִּי נַפְתָּלִי הִירְץ בִּתְשׁוּבַת רמ"א הַנְּזָכָר לְעֵיל, גַּם מַה שֶּׁכָּתַבְתִּי לְעֵיל דְּאַף דלהרשב"א בְּחִידּוּשָׁיו יֵשׁ לוֹמַר דְּעֵדוּת נָשִׁים כְּמָמוֹן, מִכָּל מָקוֹם הָא הרשב"א מִכַּת הַסּוֹבְרִים דַּאֲפִילּוּ בְּמָמוֹן לָא מְהַנֵּי בְּדִיעֲבַד, אֵינוֹ מוּכְרָע, דְּלְעוּמַת זֶה יֵשׁ לוֹמַר כֵּיוָן דְּלהרשב"א בְּחִידּוּשָׁיו הַנְּזָכָר לְעֵיל כָּל עִיקַּר הַחִיּוּב דְּקַבָּלַת עֵדוּת בְּפָנָיו בְּמָמוֹן הוּא רַק דְּרַבָּנָן, אִם כֵּן יֵשׁ לוֹמַר דַּוְקָא בְּמָמוֹן אַלְמוּהֵ לְתַקָּנָתָם וְעָשׂוּ חִיּוּק דַּאֲפִילּוּ בְּדִיעֲבַד לָא מְהַנֵּי מַה שֶּׁאֵין כֵּן לְאָסְרָהּ עַל בַּעְלָהּ אוֹקְמֵי אַדִּינָא דְּאוֹרַיְיתָא וּמְהַנֵּי הַקַּבָּלַת עֵדוּת בְּדִיעֲבַד גַּם בְּשִׁיטָּה מְקוּבֶּצֶת בְּבָבָא קַמָּא רֵישׁ פֶּרֶק הַגּוֹזֵל בַּתְּרָא כָּתַב בְּשֵׁם הָרַב הַמְּאִירִי וְזֶה לְשׁוֹנוֹ, וְכֵן הִסְכִּימוּ דְּבְעִנְיַן אִיסּוּר מְקַבְּלִין עֵדוּת שֶׁלֹּא בְּפָנָיו כְּגוֹן שֶׁהֵעִידוּ עֵדִים שֶׁלֹּא בְּפָנֶיהָ דְּנִתְקַדְּשָׁה לְאַחֵר אוֹ נִטְמְאוּ טָהֳרוֹתָיו שֶׁזְּכוּת הוּא לוֹ לְאַפְרוּשֵׁי מֵאִיסּוּרָא, עַד כָּאן לְשׁוֹנוֹ, אִם כֵּן לְכְאוֹרָה גַּם לְאָסְרָהּ עַל בַּעְלָהּ הָכִי הוּא דְּזְכוּת הוּא לוֹ, אַף דְּנִרְאֶה דְּלָאו הִלְכְתָא הָכִי, דְּרוֹב הַפּוֹסְקִים חוֹלְקִים עַל זֶה, וּכְמוֹ שֶׁרָאִיתִי בִּתְשׁוּבַת מהר"י אדריב"י וְזֶה לְשׁוֹנוֹ, וְכֵן נִרְאֶה מִתְּשׁוּבַת הריב"ש בְּקִדּוּשֵׁי מוֹרִינָה וַאֲנִי מֵעִיד שֶׁכֵּן הָיָה בְּעֵת מהרב יעקב בירך זכרונו לברכה עַל מַעֲשֶׂה שֶׁהָיָה וְכָמֶהֶם בֶּן סִיד זכרונו לברכה אֶלָּא דְּהֵם הִפְרִיזוּ עַל הַמִּדָּה לְקַבָּלַת עֵדוּת שֶׁלֹּא בְּפָנֵי בַּעַל דִּין לְאוֹסְרָהּ עַל בַּעְלָהּ, וַאֲנִי וְחַבְרַי חָלַקְנוּ עֲלֵיהֶם

[19] Responsa of Rema, Siman 17 — R. Naftali Hertz's view is cited within the Rema's Teshuvah, arguing that *b'dieved* acceptance of testimony not in the litigant's presence should be valid.

[20] Shitah Mekubetzes, Bava Kamma, beginning of Perek HaGozel Basra, in the name of the Me'iri.

[21] Teshuvos Mahariy Adribi.

so, certainly one should not deviate from this. However, nevertheless, regarding b'dieved, since in any event, according to the Ra'avan, b'dieved is effective — the acceptance of testimony not in the presence of the litigant — and similarly, it is appropriate to rule according to the Rashba in his aforementioned Chiddushim, that regarding prohibition they left it at the Torah-level law that they accept testimony not in his presence, except in actual capital cases. And combined with the view of the Me'iri mentioned above, it is impossible to be lenient b'dieved and nullify the testimony [accepted] not in his presence. And now let us come to discuss the substance of the testimony: whether it is sufficient to forbid her to her husband. Now, if we consider them witnesses of ki'ur (unseemly behavior), even though in the Shulchan Aruch, Even HaEzer, Siman 11, the Rema ruled in his gloss[22] that they do not compel a woman to leave her husband unless witnesses of ki'ur are combined with kol d'lo posik (a persistent rumor that never ceased), and as it appears, in our case this does not qualify as kol d'lo posik, as Your Honor wrote, and this is his wording: "And here there was no kol d'lo posik. And even if there was, it was not a kol d'lo posik that she had committed adultery, but rather that she was running after him. And even though after the testimony of the non-Jewish maidservant, that the suspected man exited early in the morning from her chamber, a kol d'lo posik emerged that she had committed adultery — this is not effective, for it is a rumor originating from the mouths of those disqualified from testimony. Also, the kol d'lo posik that she committed adultery that emerged after the child was delayed [in birth] is not effective, for it is evident that because the birth was delayed, they judged thus and the rumor emerged" — end quote. And if the facts are as stated, the law is with him, as the Maharshal wrote in the aforementioned Teshuvah, and it was cited by the Bach and Beis Shmuel on the aforementioned Siman.[23]

בָּזֶה, אֲבָל בְּעֵדוּת שֶׁנִּתְקַדְּשָׁה מְקֻבָּלִים עַד כָּאן לְשׁוֹנוֹ, הֲרֵי הַסְכָּמַת הַגְּאוֹנִים אֵלּוּ זכר צדיק לברכה דִּלְאָסְרָהּ עַל בַּעְלָהּ אֵין מְקֻבָּלִין שֶׁלֹּא בְּפָנָיו, וּכְדַעַת הרא"ש בִּתְשׁוּבָה הַנִּזְכָּר לְעֵיל וּכְוָותַיְיהוּ הוֹרָה לָנוּ הרמ"א, (בְּהַגָּהַת שֻׁלְחָן עָרוּךְ סִימָן י"א סְעִיף ד') אִם כֵּן בְּוַדַּאי אֵין לָווּוּ מִזֶּה, אַךְ מִכָּל מָקוֹם לְעִנְיַן דִּיעֲבַד דְּבָלָאו הָכִי לְדַעַת הראב"ן מְהַנֵּי דִּיעֲבַד הַקַּבָּלַת עֵדוּת שֶׁלֹּא בִּפְנֵי בַּעַל דִּין וְכֵן רָאוּי לָדוּן לְהרשב"א בְּחִידּוּשָׁיו הַנִּזְכָּר לְעֵיל דִּלְעִנְיַן אִיסּוּרָא אוֹקְמוּהָ אַדְּאוֹרַיְיתָא דִּמְקֻבָּלִין עֵדוּת שֶׁלֹּא בְּפָנָיו, חוּץ מִנִּפְשׁוֹת מַמָּשׁ, וּבְצֵירוּף דַּעַת הַמְּאִירִי הַנִּזְכָּר לְעֵיל אִי אֶפְשָׁר לְהָקֵל בְּדִיעֲבַד לְבַטֵּל הַגְבָּלַת עֵדוּת שֶׁלֹּא בְּפָנָיו וְעַתָּה נָבֹא לָדוּן בְּגוּף הָעֵדוּת אִם יֵשׁ כְּדַאי לְאָסְרָהּ עַל בַּעְלָהּ, הִנֵּה אִם נָדוּן אוֹתָם לְעֵדֵי כִיעוּר אַף דִּבְשֻׁלְחָן עָרוּךְ אֶבֶן הָעֶזֶר (סִימָן י"א) פָּסַק בְּהַגָּהָה דְּאֵין מוֹצִיאִין אִשָּׁה מִבַּעְלָהּ אֶלָּא אִם כֵּן בְּצֵירוּף קָלָא דְּלָא פָּסִיק לְעֵדֵי הַכִּיעוּר, וּכְפִי הַנִּרְאֶה בְּנִדּוֹן דִּידָן לָא מִקְרֵי קָלָא דְּלָא פָּסִיק כְּמוֹ שֶׁכָּתַב מַעֲלַת כְּבוֹד תּוֹרָתוֹ וְזֶה לְשׁוֹנוֹ וְהָכָא לֹא הָיָה קָלָא דְּלָא פָּסִיק, וְאַף דַּהֲוִי, לֹא הָיָה קָלָא דְּלָא פָּסִיק שֶׁנִּזְנְתָה אֶלָּא שֶׁרְהוּטָה אַחֲרָיו, וְאַף דְּלְאַחַר הַגְּדַת הָעֲרִלִית שֶׁיָּצָא הַנִּטְעָן בְּהַשְׁכָּמָה מֵהַקאמער שֶׁלָּהּ, יָצָא קוֹל דְּלָא פָּסִיק שֶׁזִּינְתָה וְזהוּ לֹא מְהַנֵּי דַּהֲוִי קוֹל הַיּוֹצֵא מִפִּי פְּסוּלֵי עֵדוּת, גַּם הַקָּלָא דְּלָא פָּסִיק שֶׁזִּינְתָה דְּיָצָא אַחַר דְּאִשְׁתַּהֵי הַוָּלָד לֹא מְהַנֵּי, דְּמוּכְחָא מִלְּתָא דְּמִשּׁוּם דְּאִשְׁתַּהֵי דָּנוּ כֵּן וְיָצָא הַקּוֹל, עַד כָּאן לְשׁוֹנוֹ, וְאִם הַדְּבָרִים כֵּן הַדִּין עִמּוֹ כְּמוֹ שֶׁכָּתַב רש"ל בִּתְשׁוּבָה

[22] SA, Even HaEzer 11 — The Rema's Hagahah rules: witnesses of *ki'ur* combined with *kol d'lo posik* render the woman forbidden to her husband.

[23] Bach and Beis Shmuel on SA, Even HaEzer 11.

הַנִּזְכָּר לְעֵיל וְהוּבָא בְּבֵית חָדָשׁ וּבֵית שְׁמוּאֵל סִימָן הַנִּזְכָּר לְעֵיל,

וְכֵן כָּתַב גַּם כֵּן הָרַמְ"א בְּתְשׁוּבָה סִימָן הַנִּזְכָּר לְעֵיל דְּאֵין לֶאֱסוֹר עַל יְדֵי קָלָא דְּלָא פָּסִיק הֵיכִי דְּיָדוּעַ לָנוּ דְּעַל פִּי עֵדוּת רָעוּעַ נַעֲשָׂה הַקּוֹל, עַד כָּאן לְשׁוֹנוֹ, אַךְ מִכָּל מָקוֹם הָא כָּתַב הר"מ בְּתְשׁוּבָה מיימוני נָשִׁים (סִימָן כ"ה) וְזֶה לְשׁוֹנוֹ וּבְנִדּוֹן דִּידַן אִלּוּ הָיָה שָׁם עֵדֵי כִּיעוּר כָּל אַפִּים שָׁוִים דַּאֲסוּרָה לְבַעְלָהּ, כְּיָוָן דְּעֵדִים רָאוּ הַכִּיעוּר וְיָלְדָה כְּמוֹ כֵן לְסוֹף י"ב חֹדֶשׁ, בְּהָא וַדַּאי לֹא אַכְשַׁר רַבָּה תּוֹסְפָאָה, דְּכֵיוָן דְּאִיכָּא עֵדֵי כִּיעוּר לֹא אָמְרִינַן דְּאִשְׁתַּהוּי אִשְׁתַּהֵי עַד כָּאן לְשׁוֹנוֹ, וְהָכִי פָּסְקִינַן לַהֲלָכָה בְּשֻׁלְחָן עָרוּךְ אֶבֶן הָעֶזֶר (סִימָן ז' סָעִיף י"ז בַּהֲגָהָה), וְהַיְינוּ מַמָּשׁ נָדוֹן דִּידַן דְּיָלְדָה לְסוֹף י' חֳדָשִׁים וּשְׁלוֹשָׁה שָׁבוּעוֹת אוּלָם עֲדַיִן אֵינוֹ בָּרוּר לַעֲנִיּוּת דַּעְתִּי לְדוּנָם לְעִדֵּי כִּיעוּר, כִּי מַה שֶּׁהֵעִיד הָרִאשׁוֹן שֶׁבַּחֲצוֹת הַלַּיְלָה עָמְדָה בִּרְחוֹב הָעִיר עִם הַנֶּחְשָׁד, אֵין לְדַמּוֹתוֹ לְמַה שֶּׁכָּתַב הָרַמְבַּ"ם (פֶּרֶק כ"ה מֵהִלְכוֹת אִישׁוּת וּבְשֻׁלְחָן עָרוּךְ סִימָן י"א) אוֹ שֶׁהָיוּ שְׁנֵיהֶם יוֹצְאִים מִמָּקוֹם אֹפֶל, כְּמוֹ שֶׁכָּתַב בְּשוּ"ת רש"ל (סִימָן ל"ג) וְזֶה לְשׁוֹנוֹ וְהָעֵדוּת הַשְּׁלִישִׁי שֶׁהַגְּאוֹנִים (רוֹצֶה לוֹמַר הָרַמְ"א זִכְרוֹנוֹ לִבְרָכָה בְּשוּ"ת הַנִּזְכָּר לְעֵיל וְסִיְּעָתוֹ הַחֲתוּמִים שָׁם שֶׁכָּתְבוּ וְזֶה לְשׁוֹנוֹ אַךְ בָּעֵדוּת הַשְּׁלִישִׁי צָרִיךְ דְּקְדּוּק, כִּי אוֹתוֹ הָעֵדוּת הוּא דָּבָר מְכֹעָר מֵאַחַר שֶׁהֵעִיד שֶׁרָאָה אוֹתָהּ עוֹמֶדֶת בְּיִחוּד אֵצֶל הַנֶּחְשָׁד בָּאֹפֶל בַּחֲצִי הַלַּיְלָה, עַד כָּאן

And so too the Rema wrote in his Teshuvah, the aforementioned Siman, that one does not forbid through kol d'lo posik where we know that the rumor was created based on unreliable testimony — end quote. However, nevertheless, the Maharam [R. Meir of Rothenburg] wrote in the Teshuvos Maimoni, Nashim, Siman 25,[24] **and this is his language: "And in our case, if there had been witnesses of ki'ur, all would agree that she is forbidden to her husband, since witnesses saw the ki'ur and she also gave birth after twelve months. In such a case, certainly Rabbah Tosa'ah did not validate [the child],**[25] **for since there are witnesses of ki'ur, we do not say that [the pregnancy] was merely delayed" — end quote. And so we rule as halachah in the Shulchan Aruch, Even HaEzer, Siman 7, Se'if 17, in the Rema's gloss.**[26] **And this is precisely our case, where she gave birth after ten months and three weeks.** This falls within the twelve-month window where the principle of *ashtahuyei ishtahi* would apply. **However, it is still not clear to my humble opinion whether to classify them as witnesses of ki'ur. For regarding what the first [witness] testified — that at midnight she stood in the city street with the suspected man — this cannot be compared to what the Rambam wrote in Chapter 25 of Hilchos Ishus**[27] **and in the Shulchan Aruch, Siman 11: "or that they were both emerging from a dark place." As the Maharshal wrote in his Teshuvos, Siman 33, and this is his language: "And regarding the third testimony, which the Geonim (meaning the Rema of blessed memory in the aforementioned Teshuvos and his supporters, the signatories there who wrote, and this is their language: 'However, the third testimony requires scrutiny, for that testimony is an unseemly matter, since he testified that he saw her standing in seclusion with the suspected man in the dark at midnight' — end of their quote) compared this to ki'ur. I say: even though it is ki'ur from which one should distance oneself, nevertheless, this is not ki'ur that forbids her to her husband. For it is not comparable at all to what the Rambam wrote: 'both emerging from a dark place.' For there, the meaning is a hidden place**

[24]Teshuvos Maimoni, Nashim, Siman 25 — The Maharam (R. Meir of Rothenburg) rules that when there are witnesses of *ki'ur* and the woman also gave birth after twelve months, all agree she is forbidden to her husband, because the principle of *ashtahuyei ishtahi* cannot be invoked in such circumstances.

[25]Yevamos 80b — Rabbah Tosa'ah validated children born after twelve months based on the principle that the pregnancy can be delayed (*ashtahuyei ishtahi*).

[26]SA, Even HaEzer 7:17, Rema's gloss — The Rema cites the ruling that *ki'ur* combined with birth after twelve months renders her forbidden.

[27]Rambam, Hilchos Ishus 25:2 — The Rambam lists examples of *ki'ur*: finding her rising from the bed while she is wearing undergarments, or wearing a belt/apron, or both emerging from a dark place, or they entered together and closed the doors.

designated for sin, to conceal an act. But in our case, where it was at the entrance of the house and passersby are common throughout the large city, and the city watchmen patrol constantly — this is not a hidden place at all" — end quote. Also, the Mabit wrote in his Teshuvos, Siman 287,[28] and this is his language: "A dark place means that in that dark place, it was not the way for any person who does not reside there to enter that dark place, similar to [the case of] 'they were pulling each other up from a pit and the like,' where it is not customary to enter a pit. And similarly, 'they entered one after the other and closed the doors' is a place of seclusion and concealment, since it is a room enclosed on all sides, and no person can enter and see what they are doing. But in our case, it is exposed to passersby. And if so, this is not ki'ur that the circumstances indicate that sin occurred there. On the contrary, the circumstances indicate that sin did not actually occur there, for even though a spirit of folly entered them, they would not stand to commit an actual sin in a place of passersby" — end quote. Also, the sage R. Naftali Hertz, of blessed memory, whose words are cited in the Rema's Teshuvos, Siman 17,[29] wrote regarding the ruling of the Rema of blessed memory and his supporters, and this is his language: "That which the three shepherds struggled with regarding the last testimony, that he saw them standing at the open entrance, in the city street in the dead of night, and they agreed that this constitutes witnesses of ki'ur like what the Rambam wrote: 'both emerging from a dark place.' But it seems to me that it is not comparable, for 'a dark place' means a place where no person's foot is commonly found, and the circumstances are recognizable that sin occurred there, for otherwise, why did they enter a dark place? But in a place where a person's foot is commonly found, even in the dead of night and in darkness, one cannot say that sin certainly occurred there, for they would be afraid that perhaps a person would pass before them — such as those who rise at midnight to study or one of the townspeople who awakens from his sleep and goes outside" — end quote. And it seems to me that their words are supported by a precise reading of the Rambam's language which is from the Yerushalmi: "both emerging from a dark place" — and he did not say "they were seen standing together in a dark place." Rather, certainly "a dark place" means a place that is

לְשׁוֹנוֹ] דְּמַמּוּ זֶה לְכִיעוּר, אוֹמֵר אֲנִי אַף שֶׁהוּא כִּיעוּר לְהִתְרַחֵק מִמֶּנּוּ, מִכָּל מָקוֹם אֵין זֶה כִּיעוּר לְאָסְרָהּ עַל בַּעְלָהּ, דְּאֵינוֹ דּוֹמֶה כְּלָל לְמַה שֶּׁכָּתַב הָרַמְבַּ"ם שְׁנֵיהֶם יוֹצְאִים מִמָּקוֹם אֹפֶל, דְּהָתָם פֵּירוּשׁוֹ מָקוֹם סֵתֶר וּמְיֻחָד לַעֲבֵירָה לְהִסְתֵּר דָּבָר, מַה שֶּׁאֵין כֵּן בְּנִדּוֹן זֶה שֶׁהוּא בְּפֶתַח הַבַּיִת וְעוֹבְרִים וְשָׁבִים מְצוּיִים בָּעִיר הַגְּדוֹלָה כֻּלָּהּ וְשׁוֹמְרֵי הָעִיר סוֹבְבִים תָּמִיד אֵין זֶה סֵתֶר שֶׁל כְּלָל עַד כָּאן לְשׁוֹנוֹ. גַּם הַמַּבִּי"ט כָּתַב בְּשׁו"ת (סִימָן רפ"ז) וְזֶה לְשׁוֹנוֹ, מָקוֹם אֹפֶל הַיְינוּ דְּבָאוֹתוֹ מָקוֹם אֹפֶל לֹא הָיָה דֶּרֶךְ לְשׁוּם אָדָם שֶׁאֵינוֹ דָּר שָׁם לִכְנוֹס בְּאוֹתוֹ מָקוֹם אֹפֶל, דּוּמְיָא דְּמַעֲלִין זֶה אַחַר זֶה מִן הַבּוֹר וְכַיּוֹצֵא בּוֹ שֶׁאֵין דֶּרֶךְ לִכְנוֹס לַבּוֹר, וְכֵן נִכְנְסוּ זֶה אַחַר זֶה וְהִגְיפוּ הַדְּלָתוֹת הוּא מָקוֹם יְחוּד וְסֵתֶר כֵּיוָן שֶׁהוּא בַּיִת מְקֻף מִכָּל צַד, וְאֵין שׁוּם אָדָם יָכוֹל לִכְנוֹס וְלִרְאוֹת מָה הֵם עוֹשִׂים, וּבְנִידוֹן זֶה הוּא מוּכָן לְעוֹבְרִים וְשָׁבִים, וְאִם כֵּן אֵין זֶה מְכֹעָר שֶׁיִּהְיֶה הַדְּבָרִים מַרְאִין שָׁהָיָה שָׁם עֲבֵירָה, אַדְרַבָּא הַדְּבָרִים נִרְאִין שֶׁלֹּא הָיָה שָׁם עֲבֵירָה בְּפוֹעַל, כִּי אַף עַל פִּי שֶׁנִּכְנַס בָּהֶם רוּחַ שְׁטוּת לֹא יַעַמְדוּ לַעֲשׂוֹת עֲבֵירָה בְּפוֹעַל בְּמָקוֹם עוֹבְרִים וְשָׁבִים, עַד כָּאן לְשׁוֹנוֹ, גַּם הֶחָכָם מהרב נַפְתָּלִי הִירְץ זִכְרוֹנוֹ לִבְרָכָה הוּבָא דְּבָרָיו בְּשׁו"ת רמ"א (סִימָן י"ז) כָּתַב עַל פִּסְקוֹ שֶׁל הָרַמְ"א זִכְרוֹנוֹ לִבְרָכָה וְסִיַּעְתּוֹ וְזֶה לְשׁוֹנוֹ, אֲשֶׁר נִתְחַבְּטוּ שְׁלֹשָׁה הָרוֹעִים בָּעֵד הָאַחֲרוֹן שֶׁרָאָה אוֹתָם עוֹמְדִים אֶצֶל הַפֶּתַח פָּתוּחַ בְּרֹחַב הָעִיר בְּאִישׁוֹן לַיְלָה, וְהִסְכִּימָה דַּעְתָּם שֶׁהוּא עִידֵי כִּיעוּר כְּמוֹ שֶׁכָּתַב הָרַמְבַּ"ם שְׁנֵיהֶם יוֹצְאִים מִמָּקוֹם אֹפֶל,

[28] Teshuvos Mabit, Siman 287.

[29] Responsa of Rema, Siman 17 — R. Naftali Hertz argues that the Rambam's "dark place" means a location where no person's foot is normally found, unlike a public street where passersby might appear.

completely hidden, where no person's foot passes, and it does not happen that people would see them standing there, since no one passes there. The only possibility is that they are seen on their way out from this place, and it is thereby known that when they were inside, they were hidden in a dark place. And even though the view of the Rema and his aforementioned supporters is that her standing with the suspected man at midnight at the entrance of her house constitutes ki'ur, nevertheless, since the Maharshal and the sage R. Naftali Hertz of blessed memory mentioned above saw their words and both prophesied in the same style to reject their words with good reasoning and judgment, and in accordance with their view the Mabit also reasoned in his aforementioned Teshuvos — it seems to me that we follow their view as halachah. And one cannot argue that even though there was not actual ki'ur, nevertheless, with even minimal ki'ur combined with the deficiency of having given birth after twelve months, she is forbidden. For this is not so. For one who examines the aforementioned Teshuvos Maimoni will see from the arrangement of his words that first he wrote: "Indeed, if there are witnesses of ki'ur," "and like those [cases described] in Chapter 2 of Yevamos —

וְלִנְרָאֶה לִי שֶׁאֵינוֹ דּוֹמֶה, כִּי מָקוֹם אֹפֶל הַיְינוּ שֶׁאֵין רֶגֶל אָדָם מָצוּי שָׁם וְנִכָּרִים הַדְּבָרִים שֶׁהָיָה שָׁם עֲבֵירָה כִּי לוּלֵי זֶה לָמָּה נִכְנְסוּ לְמָקוֹם אֹפֶל, אֲבָל בְּמָקוֹם שֶׁרֶגֶל אָדָם מָצוּי שָׁם אֲפִלּוּ בְּאִישׁוֹן לַיְלָה וַאֲפֵלָה, אֵין לוֹמַר בְּוַדַּאי הָיָה שָׁם עֲבֵירָה, כִּי מְרַתְּתִים אוּלַי יַעֲבוֹר שָׁם אָדָם לְפָנֵיהֶם, כְּגוֹן הָעוֹמְדִים בַּחֲצוֹת הַלַּיְלָה לִלְמֹד אוֹ אֶחָד מִבְּנֵי הָעִיר יֵעוֹר מִשְּׁנָתוֹ וְיֵצֵא לַחוּץ, עַד כָּאן לְשׁוֹנוֹ. וְנִרְאֶה לִי לְהִסְתַּיֵּעַ לְדִבְרֵיהֶם מִדְּקְדּוּק לִישָׁנָא דְּהָרַמְבַּ"ם וְהוּא מֵהַיְרוּשַׁלְמִי, שְׁנֵיהֶם יוֹצְאִים מִמָּקוֹם אֹפֶל וְלֹא נָקַט שֶׁרָאוּ אוֹתָם עוֹמְדִים יַחַד בְּמָקוֹם אֹפֶל, אֶלָּא וַדַּאי דְּמָקוֹם אֹפֶל הַיְינוּ מָקוֹם סֵתֶר לְגַמְרֵי שֶׁאֵין רֶגֶל אָדָם עוֹבֵר שָׁם, וְלֹא מִזְדַּמֵּן שֶׁיִּרְאוּ אוֹתָם אֲנָשִׁים עוֹמְדִים שָׁם, כְּיָון שֶׁאִישׁ אֵינוֹ עוֹבֵר שָׁם, רַק זֶהוּ בָּאֶפְשָׁרִי שֶׁרוֹאִים אוֹתָם דֶּרֶךְ יְצִיאָתָם מִמָּקוֹם הַזֶּה, דִּידוּעַ עַל יְדֵי כָּךְ דְּכְשֶׁהָיוּ בַּפְּנִים הָיוּ מוּסְתָּרִים בְּמָקוֹם אֹפֶל, וְאַף דְּדַעַת הָרַמְ"א וְסִיְּעָתוֹ הַנָּזְכָּר לְעֵיל סְבִירָא לֵיהּ דַּעֲמִידָתָהּ עִם הַנֶּחְשָׁד בַּחֲצוֹת לַיְלָה עַל פֶּתַח בֵּיתָהּ הֲוֵי כִּיעוּר מִכָּל מָקוֹם כְּיָון דְּהָרַשַּׁ"ל וְהֶחָכָם רַבִּי נַפְתָּלִי הִירְץ זְכרוֹנוֹ לִבְרָכָה הַנָּזְכָּר לְעֵיל רָאוּ דִּבְרֵיהֶם וּשְׁנֵיהֶם נִתְנַבְּאוּ בְּסִגְנוֹן אֶחָד לִדְחוֹת דִּבְרֵיהֶם בְּטוּב טַעַם וָדַעַת, וּכְוָותַיְיהוּ כְּוֵן גַּם כֵּן בְּשִׁוּ"ת הַמַּבִּי"ט הַנָּזְכָּר לְעֵיל נִרְאֶה לִי דִּכְוָותַיְיהוּ נָקְטִינַן לַהֲלָכָה. וְאֵין לְפַקְפֵּק וְלוֹמַר דְּאַף דְּלֹא הָיָה כִּיעוּר מַמָּשׁ, מִכָּל מָקוֹם בְּמַעַט כִּיעוּר כָּל דְּהוּ בְּהִצְטָרֵף רֵיעוּתָא דְּיָלְדָה לְי"ב חֹדֶשׁ אֲסוּרָה, דְּזֶה אֵינוֹ, דְּהַמְעַיֵּן בְּשִׁוּ"ת מַיְימוֹנִי הַנָּזְכָּר לְעֵיל יִרְאֶה מִסִּידּוּר דְּבָרָיו דְּמִתְּחִלָּה כָּתַב אָמְנָם אִם יֵשׁ עֵדֵי כִּיעוּר, וְכְגוֹן הָנֵי דְּפֶרֶק ב' דִּיבָמוֹת רוֹכֵל יוֹצֵא וְכוּ' וּבְנִדּוֹן זֶה אִלּוּ הָיָה עֵדֵי

כִּיעוּר כָּל אַפַּיִם שָׁוִים דַּאֲסוּרָה לְבַעַל כֵּיוָן דְּיָלְדָה לִי"ב חֹדֶשׁ, מַשְׁמַע לְהֶדְיָא דְּמַיְירֵי בְּכִיעוּר דְּזָכַר בִּתְחִלָּה, דְּהִתְנָה כְּגוֹן דְּפֵרֵק ב' דִּיבָמוֹת וְכוּ', וְלֹא בָּא לְחַדֵּשׁ רַק בְּנִידּוֹן זֶה דְּיָלְדָה לִי"ב חֹדֶשׁ, גַּם הַחוֹלְקִים עַל הַשְּׁאִלְתּוֹת מוֹדִים דַּאֲסוּרָה וְאִם נֵימָא דְּיָלְדָה לִי"ב חֹדֶשׁ אֲסוּרָה עַל יְדֵי כִּיעוּר כָּל דְּהוּ, הֲוֵה לֵיהּ לְמִנְקַט לְהַשְׁמִיעֵנוּ יוֹתֵר רַבּוּתָא, דְּבְנִידּוֹן זֶה אֲפִלּוּ הָיָה כִּיעוּר מְעַט כָּל אַפַּיִם שָׁוִים דַּאֲסוּרָה כֵּיוָן דְּיָלְדָה לִי"ב חֹדֶשׁ, אֶלָּא עַל כָּרְחָךְ נִרְאֶה לִי דְּהַדָּבָר בָּרוּר דְּכָל כִּיעוּר דְּלֹא מִתַּסְרָא לְהַשְּׁאִלְתּוֹת, לֹא מִתַּסְרָא גַּם בְּהִצְטָרֵף רֵיעוּתָא דְּיָלְדָה לִי"ב חֹדֶשׁ, וְהָכִי נָמֵי מַשְׁמַע מִלִּישָׁנָא דְּהַגָּהַת שֻׁלְחָן עָרוּךְ (סִימָן ד') שֶׁסָּתַם וְכָתַב דְּדָבָר מְכֹעָר וְיָלְדָה לִי"ב חֹדֶשׁ אֲסוּרָה וְלֹא בֵּיאֵר לָנוּ מָה נִקְרָא כִּיעוּר, וּמָה גְּבוּל יֵשׁ לוֹ, מַשְׁמַע דְּסָמַךְ עַל הַכִּיעוּר דְּבְסִימָן י"א). וּמֵהַאי טַעְמָא נִרְאֶה לִי בָּרוּר גַּם כֵּן דְּבְנִתְיַחֲדָה בְּדֶרֶךְ אִיסּוּר, וְיָלְדָה לִי"ב חֹדֶשׁ דְּלֹא אֲסוּרָה, דְּהָא בִּשְׁבִיל יִחוּד לְחוּד לֹא מִתַּסְרָא לְהַשְּׁאִלְתּוֹת וְהָרַ"ב, דְּהָא קַיְימָא לַן דְּאֵין אוֹסְרִים עַל הַיִּחוּד, וּכְמוֹ שֶׁכָּתַב לְהֶדְיָא בִּשְׁוּ"ת מַיְימוֹנִי הַנְּזָכָר לְעֵיל, וְאַף דְּהָרַמְבַּ"ם מַחְשִׁיב נְכָנְסוּ זֶה אַחַר זֶה וְהִגִּיפוּ הַדְּלָתוֹת לְכִיעוּר מִכָּל מָקוֹם נִרְאֶה לַעֲנִיוּת דַּעְתִּי דְּיִחוּד בְּעָלְמָא אֵינוֹ בִּכְלַל הַכִּיעוּר, הָרְאָיָה הָרִאשׁוֹנָה שֶׁהֵרֵי דַּעַת הָרַמְבַּ"ם (פֶּרֶק כ"ד מֵהִלְכוֹת אִישׁוּת) דְּבְכִיעוּר יוֹצֵאת בְּלֹא כְּתוּבָה בְּלֹא הַתְרָאָה, וְאִלּוּ בְּנִסְתְּרָה בְּעָלְמָא, מִבֹּאָר בְּסוֹטָה (דַּף כ"ה) דַּהֲוֵי בִּכְלַל עוֹבֶרֶת עַל דָּת

'a peddler emerging, etc.'"[30] And he continues: "In our case, if there had been witnesses of ki'ur, all would agree that she is forbidden to her husband, since she gave birth after twelve months." This clearly implies that he is speaking of ki'ur of the type he mentioned at the outset — the kind he stipulated, "like those of Chapter 2 of Yevamos, etc." And he only came to innovate regarding the case where she gave birth after twelve months: that even those who disagree with the She'iltos agree she is forbidden. And if we were to say that giving birth after twelve months renders her forbidden through any minimal ki'ur, he should have formulated it to teach us a greater chiddush: that in this case, even if there was only slight ki'ur, all agree she is forbidden since she gave birth after twelve months. Rather, it must be — and it seems clear to me — that any ki'ur through which she is not forbidden according to the She'iltos, does not render her forbidden even when combined with the deficiency of having given birth after twelve months. And the same is implied by the language of the Rema's gloss on Siman 4,[31] where he wrote simply that with an unseemly matter and birth after twelve months she is forbidden, and did not explain to us what is called ki'ur or what its boundaries are. This implies he relied on the [definition of] ki'ur in Siman 11. And for this reason, it is also clear to me that where she was secluded [with a man] in a prohibited manner and gave birth after twelve months, she is not forbidden. For through yichud (seclusion) alone she is not forbidden according to the She'iltos and the Rav [Maharam], for we hold that one does not forbid [a woman to her husband] based on seclusion, as stated explicitly in the aforementioned Teshuvos Maimoni. And even though the Rambam classifies "they entered one after the other and closed the doors" as ki'ur, nevertheless, it appears to my humble opinion that mere seclusion is not included in [the category of] ki'ur. The first proof: The Rambam holds in Chapter 24 of Hilchos Ishus[32] that with ki'ur, she leaves without her kesubah and without prior warning. But regarding mere seclusion, it is stated in Sotah 25a[33] that it is categorized as "transgressing the religious norm" and she requires prior warning to lose her kesubah. If seclusion were equivalent to *ki'ur*, no warning would be needed; the fact that warning

[30] Yevamos 24b — The Gemara discusses the cases of *ki'ur*: a peddler exiting, wearing an apron, etc.: קָדְמוּ וְכָנְסוּ אֵין מוֹצִיאִין.

[31] SA, Even HaEzer 4, Rema's gloss — The Rema rules that with an unseemly matter (*davar mechuar*) and birth after twelve months, the woman is forbidden to her husband.

[32] Rambam, Hilchos Ishus 24 — Discusses that with *ki'ur*, the woman loses her *kesubah* without prior warning.

[33] Sotah 25a — The Gemara discusses whether a woman who violates religious norms (*overes al das*) requires warning to forfeit her *kesubah*: אִיבַּעְיָא לְהוּ: עוֹבֶרֶת עַל דָּת צְרִיכָה הַתְרָאָה לְהַפְסִידָה כְּתוּבָּתָהּ.